Supreme Court, U. S.
FILED
MAY 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1502

AVNET, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARNOLD M. LERMAN
RONALD J. GREENE
NEAL M. GOLDBERG

Attorneys for Petitioner, Avnet, Inc.

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

May 29, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Avnet, Inc. ("Avnet") hereby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on February 28, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 511 F.2d 70 and is set forth in the appendix at pages 1a-18a. The opinion of the Federal Trade Commission ("Commission") is reported at 82 F.T.C. 444 (1973) and is set out in the appendix at pages 19a-84a.

JURISDICTION

The Opinion of the Court of Appeals for the Seventh Circuit was rendered on February 28, 1975. This petition was filed within 90 days of the date of the Court of Appeals decision. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In an adjudicatory proceeding, may agency counsel fail or refuse to notify a respondent that material allegations of the complaint are misleading, and that the case turns upon an essential factual determination in conflict with the complaint and the parties' stipulation of issues?

2. Can a relevant product market be defined solely on the basis of a supposed "functional difference" between two groups of purchasers of identical products used for identical purposes?

STATUTORY PROVISIONS INVOLVED

1. *Clayton Act § 7, 15 U.S.C. § 18*:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

2. *Administrative Procedure Act, 5 U.S.C. § 554*:

> (b) Persons entitled to notice of an agency hearing shall be timely informed of—

> (1) the time, place, and nature of the hearing;
>
> (2) the legal authority and jurisdiction under which the hearing is to be held; and
>
> (3) the matters of fact and law asserted.
>
> When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.
>
> (c) The agency shall give all interested parties opportunity for—
>
> (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
>
> (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

3. *Federal Trade Commission Rules §§ 3.11 and 3.15*

> § 3.11 *Commencement of proceedings.*—
>
> (a) *Complaint.*—Except as provided in § 3.13, an adjudicative proceeding is commenced by the issuance and service of a complaint by the Commission.
>
> (b) *Form of complaint.*—The Commission's complaint shall contain the following:
>
> (1) Recital of the legal authority and jurisdiction for institution of the proceedings, with specific designation of the statutory provisions alleged to have been violated;
>
> (2) A clear and concise factual statement sufficient to inform each respondent with reasonable

definiteness of the type of acts or practices alleged to be in violation of the law;

(3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint; and

(4) Notice of the time and place for hearing, the time to be at least thirty (30) days after service of the complaint.

* * * *

§ 3.15 *Amendments and supplemental pleadings.*—

(a) *Amendments.*—(1) *By leave.*—If and whenever determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings or notice of hearing: *Provided, however,* That a motion for amendment of a complaint or notice may be allowed by the Administrative Law Judge only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission.

(2) *Conformance to evidence.*—When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve a recurring problem in federal administrative

practice: the scope of the obligation of an agency to provide clear notice of any material changes in the issues being tried in adjudicatory proceedings. The Court should determine whether agency counsel can fail or refuse until the close of trial to notify a respondent of a substantial change in an essential element of their case. The lack of a clear-cut obligation for agency counsel to furnish notice invites, and even rewards, the raising of issues by indirection. It places respondents in agency proceedings in the position of developing defenses based upon guesswork. And it forces appellate courts to speculate about the degree of knowledge they can attribute to such respondents and to comb voluminous records to determine whether lack of knowledge has affected the course of the proceedings. All of these difficulties could be avoided by ruling that the existence of adequate notice of a substantial change in issues will not be inferred from a review of the record as a whole—at least in those circumstances where the change contradicts the allegations of the complaint. Instead, this Court should require a simple, but explicit, acknowledgment on the record before the end of trial indicating that a new issue has been injected into the proceedings.

This simple resolution is suggested with particular force by the circumstances of this case. Here, the Court of Appeals permitted a substantial variance between the issues alleged in the original complaint and the ultimately dispositive issue by concluding that at some point Avnet was aware of the change. Nevertheless, agency counsel presented their entire affirmative case in a manner consistent with the original claims in the complaint. If counsel knew that they desired to pursue a different course, they had an obligation to so state. If they did not know that a change had taken place, it was inappropriate to charge Avnet with such knowledge. In any event, Avnet should not have been forced to guess what

agency counsel really had in mind from, for example, the questions and objections of agency counsel during the presentation of Avnet's witnesses.

The case also presents a serious question concerning the tests to be applied in defining the relevant product market. As a result of the gaps in the record caused by the lack of clear notice, the Commission's definition of the relevant market was found by the Court of Appeals to rest only upon an alleged functional difference between two groups of purchasers—one of which was excluded from the market—even though both purchased the same product and used it for the same purpose. As we show below, this reliance on one factor of such dubious relevance constitutes a serious departure from principles established by this Court. Indeed, a recent ruling of the Ninth Circuit is in direct conflict with the ruling below.

A. Procedural Background

The points at issue arose out of a proceeding before the Federal Trade Commission under Section 7 of the Clayton Act. The Commission had issued a Complaint on April 1, 1969, charging that the 1964 acquisition by Avnet of Guarantee Generator and Armature Co., d/b/a International Products and Manufacturing Co. ("IPM") would lessen competition in the "manufacture and/or supply of parts, materials, and equipment to independent rebuilders [of automotive electrical units.]" (App. 22.)[1] IPM and a division of Avnet, Valley Forge Products, Inc. ("Valley Forge"), had sales in that market.[2]

The case was prepared for trial under an Amended Complaint which alleged that the rebuilding industry "constituted a highly fragmented industry, primarily made up of many small concerns." (App. 45.) The

[1] A certified copy of the Joint Appendix printed for use of the Court of Appeals has been furnished to this Court and references to it in this Petition are in the form "App.".

[2] Avnet had acquired Valley Forge in July, 1964, only six months before its acquisition of IPM.

Amended Complaint alleged that IPM alone—just one of the rebuilder suppliers whose sales were alleged to constitute the relevant market—made sales to "over 5,000 independent distributors and rebuilders." (App. 44.) By the time the Hearing Examiner and the Commission rendered their decisions, the market had been restricted to sales to only 150 to 200 of these more than 5,000 rebuilders. *See* 511 F.2d at 74. These 150 or 200 were allegedly distinguished from other rebuilders by their use of "production-line" techniques. As the Court of Appeals indicated, a review of the record does not disclose when this change first appeared as a possibility during the trial of the case. 511 F.2d at 76.

The Amended Complaint also alleged that, notwithstanding the fragmentation on the demand side of the relevant market, the number of suppliers was quite small. It stated that in 1964 "sixteen firms supplied virtually the total volume of equipment and parts furnished to rebuilders." (App. 45.) As the Court of Appeals found, Avnet developed its case with primary emphasis on proving the falsity of this allegation. In the words of the Court, Avnet attempted "to develop evidence that the 16 firms have so many competitors that their sales do not comprise a relevant market or submarket." 511 F.2d at 73.

The parties' joint Stipulation of Issues[3] filed during the prehearing phase of the proceedings reflects the clear understanding of the parties as to the disputed issues. This stipulation listed fourteen issues and stated that "for the purposes of this proceeding, [the listed subjects] are the contested issues." Each of the fourteen relates in some way to the supply side of the alleged relevant market. None of them related to the identity of the purchasers in the market or suggested that fewer than 5,000 customers were included. Indeed, on the fifth day of the

[3] Commission Exhibit 276, included in the record of proceedings.

hearing, in a colloquy between counsel and the Hearing Examiner, the Examiner confirmed that the definition of "rebuilder," and hence of the identity of the customers in the market, "is not an issue." (App. 569.) Accordingly, the presentation of evidence proceeded throughout the case-in-chief of agency counsel without either party attempting to distinguish in the introduction of sales data between sales to production-line rebuilders (which were ultimately included in the market) and sales to custom rebuilders (which were excluded).[4]

At various points during the presentation of Avnet's defense, the questions and objections of agency counsel seemed to indicate that they were trying to draw some distinction between sales to production-line rebuilders and sales to custom rebuilders. Nevertheless, agency counsel's new definition of the term "rebuilders"—which limited it solely to production-line rebuilders—appeared for the first time in their proposed findings. (App. 125-29.) This appearance of a new definition caused Avnet to argue in its Reply Brief to the Examiner that "a substantial and unauthorized amendment to the Amended Complaint" had been proposed in the findings.[5] Although this argument was renewed before the Commission, it was addressed by neither the Examiner nor the Commission.

Both the Examiner and the Commission concluded that the relevant market consisted only of sales to the 150 or 200 production-line rebuilders, and that IPM and

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[4] *See, e.g.*, App. 594, 601, 616-17, 627-29, 664, 685.

[5] The Reply Brief (App. 218) stated: "With respect to the newly proffered definitions of 'parts/units,' 'rebuilders,' and 'suppliers,' however, Respondent was unable to foresee the ingenuity with which Complaint Counsel would endeavor to tailor a line of commerce precisely to the dimensions of Respondent's business. In their effort to define a market in just such terms, Complaint Counsel continue to disregard the overwhelming weight of the evidence developed in this proceeding and in effect propose a substantial and unauthorized amendment to the Amended Complaint."

Valley Forge had 67 percent of these sales. On appeal before the United States Court of Appeals for the Seventh Circuit, Avnet contended that the Commission's action in permitting this late and contradictory change denied it administrative due process. Avnet also argued that the resulting market definition was improper under the accepted principles governing the delineation of relevant product markets. On the procedural issue, Avnet argued that the Commission denied it an adequate opportunity to prepare its case and to present evidence demonstrating that there was no basis for singling out as a separate market sales to only 150 or 200 of the more than 5,000 rebuilders mentioned in the Complaint. For example, because the Complaint had indicated that all of IPM's 5,000 customers were included within the market, Avnet saw no need to break its customers into categories and prove that the various categories should be treated similarly. Thus, as the Court of Appeals recognized, 511 F.2d at 78, Avnet failed to make a timely or complete offer of proof demonstrating how IPM's sales could be divided between those made to the 150 or 200 of the 5,000 customers who constituted "production-line rebuilders" ultimately included in the market and sales to the rest of its customers who, under the Commission's decision, were excluded from the market as "custom rebuilders." Moreover, Avnet argued that if agency counsel had been proceeding on the theory that the market was limited to purchases by 150 or 200 rebuilders, they could easily have developed and introduced evidence specifically setting forth the amount of those purchases. Avnet contended that the absence of crucial evidence of this sort in the record demonstrated that it had been denied an effective opportunity to prepare and present a defense and that in fact its entire preparation had been directed at a wholly different set of issues.

Although the Court of Appeals conceded that Avnet's reading of the Complaint was "reasonable," it rejected

Avnet's contentions that it had been denied due process by being forced to guess which of complaint counsel's theories it would be required to meet. Instead, the Court concluded that an examination of the record as a whole disclosed a "sharp dispute" concerning the definition of the term "rebuilder." Although the Court found it impossible to identify the point in the proceeding at which Avnet allegedly became aware that the definition in the Complaint was being changed, the Court found (without citing any portion of the record) that Avnet "had sufficient understanding of the issues, and sufficient time" to prepare its defense. 511 F.2d at 77.

B. Factual Background

The evidence received by the Commission provides a general outline of the industry within which the challenged acquisition took place. As the record demonstrates, an owner of a malfunctioning automotive electrical unit [6] can choose among a number of alternatives to obtain a unit which performs satisfactorily. He may (a) purchase a completely new unit, either turning over his old unit "in exchange" or disposing of it in some other way; (b) purchase a rebuilt unit, similarly either exchanging his old unit or disposing of it in some other way; (c) rebuild his old unit or have it rebuilt; or (d) repair his old unit or have it repaired.[7] See App. 760, 893-94.

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[6] The automotive electrical units which are most susceptible to rebuilding are alternators, generators, starters, and voltage regulators. In addition, individual components of these four principal units can be rebuilt. These components include armatures and field coils (parts of starters and generators), starter drives and solenoids (parts of starters), rotors and stators (parts of alternators), as well as bearings, shafts, and other generally used components.

[7] In rebuilding an automotive electrical unit, a rebuilder completely dismantles the used unit and cleans and tests its components. If any of them are defective or excessively worn, he restores them or replaces them with new, rebuilt, reconditioned, or unimpared used components. Finally, the unit is reassembled to restore it to working order. The word "repair" as used in this industry describes the removal and replacement only of malfunctioning parts of a unit.

The rebuilding industry exists only because rebuilding of discarded electrical units (called "cores") can usually be accomplished at substantially less cost than the price charged by original equipment manufacturers ("OEMs") —those firms, including the major automobile manufacturers, who produce equipment installed in new vehicles— for comparable new units.[8] The record demonstrates that rebuilding is done by a wide variety of firms. OEMs perform rebuilding themselves and also supervise rebuilding done by "authorized" rebuilders, who produce rebuilt units sold by the OEMs through their own aftermarket distribution outlets. A variety of other companies in the automotive aftermarket rebuild automotive electrical units, including (in addition to firms specializing in rebuilding) warehouse distributors, jobbers, electrical specialty and repair shops, service stations and fleets.[9] The OEMs sometimes authorize these companies to distribute OEM products, either as warehouse distributors or jobbers, and because of this relationship such companies obtain OEM products for rebuilding at a discount.

Different rebuilders have chosen to adopt different production techniques in performing the rebuilding func-

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[8] Thus if the OEMs were to produce "sealed" units not susceptible to rebuilding the rebuilding industry would go out of business. Similarly, if the OEMs were to reduce substantially the prices at which they sell new electrical components in the aftermarket, rebuilders would probably find it impossible to compete. (App. 348-49.)

[9] Warehouse distributors ("WDs") are independently owned and operated companies that stock an inventory of products purchased from one or more original equipment manufacturers or other firms for resale to customers including jobbers, dealers, "rebuilders," garages, and service stations. WDs often maintain their own service facilities. Jobbers are usually smaller companies that purchase products from WDs for resale to a wide range of aftermarket customers.

tion. Some employ "production-line" techniques under which each of the various phases of the rebuilding function is performed at different times or by different workers. Others utilize a "custom" rebuilding technique which entails work on one unit at a time with very little division of labor among different workers or machines. Some use a combination of methods. Under any method, the workers take a used "core" and transform it into a rebuilt unit by replacing worn or defective parts with new, rebuilt or used ones.

All rebuilders acquire the same parts, materials and equipment from many different sources, including, in addition to IPM and Valley Forge, firms of many types, such as those who offer either full or narrow lines of products used by rebuilders, those who offer products to the automotive trade generally, and those who sell industrial products to a broad span of users, including rebuilders. The suppliers range in size from the very small to some of the largest industrial firms in the nation, and their sales to rebuilders may be either a small or a large portion of their total sales.

A rebuilder must determine not only whether he will buy the component which he needs in new, rebuilt or used condition, but also what type or types of suppliers he will patronize. The record indicates that the rebuilder makes this decision by weighing factors of price, quality or availability. The rebuilt unit may reach the vehicle owner directly or through a chain of distribution handling rebuilt units. The record demonstrates, in any event, that rebuilders of all types, regardless of size, production techniques or methods of distribution, compete with each other at various levels of the automotive aftermarket, ranging from their purchase of supplies to ultimate competition, either direct or indirect, for the installation of the rebuilt unit on a vehicle.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER AGENCY COUNSEL IN AN ADJUDICATORY PROCEEDING MAY FAIL OR REFUSE TO NOTIFY A RESPONDENT OF A SUBSTANTIAL DEPARTURE FROM THE COMPLAINT

The decision of the Court of Appeals raises a clearly defined, important question of federal law which has not been, but should be, settled by this Court. As we show below, the Court should clarify the confused body of case law which has developed as a result of the continuing failure of agencies to give clear notice to respondents of changes in the theories they are pursuing. It should do so by adopting a simple rule: the existence of adequate notice will not be inferred from a review of the record in the absence of an explicit agency acknowledgment on the record that a new issue has been injected in the proceedings. This rule should be applied at least when the new issue involves a contradiction of a material portion of the complaint.

It is a well settled principle of administrative practice that "the key to pleading and notice in the administrative process is adequate opportunity to prepare." [10] Without adequate notice of all crucial elements of the case against it, a respondent cannot prepare or present its case to the initial finder of facts. *Jaffee & Co.* v. *SEC*, 446 F.2d 387, 394 (2d Cir. 1971). Accordingly, the Administrative Procedure Act in Section 5(b)[11] and the governing rules of most administrative agencies as well (including the FTC),[12] include provisions designed to afford a respondent a reasonable opportunity to prepare

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[10] K. Davis, Administrative Law Treatise, § 8.05, p. 530 (1958).

[11] 5 U.S.C. § 554(b).

[12] Rule 3.11, FTC Rules of Practice and Procedure.

a defense, after due notice of the legal and factual issues being raised against it.

In accordance with this basic tenet of administrative law, a number of limitations have developed on the power of an agency to shift theories. One such restriction prevents an agency from introducing a new issue at the review stage after the initial trier of fact has reached a decision based on a different theory. *Bendix Corp.* v. *FTC*, 450 F.2d 534 (6th Cir. 1971); *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252 (D.C. Cir. 1968). The Courts have thus held that an agency may not change theories "in midstream without giving respondents reasonable notice of the change." *Id.* 407 F.2d at 1256. Other cases make the point that an agency may only change its theory during the hearing if the respondent has a fair opportunity to respond to the shift, *see, e.g., Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F.2d 499 (D.C. Cir. 1961); *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954). Agency rules, such as Rule 3.11 of the FTC Rules of Practice and Procedure, make this requirement explicit.

Notwithstanding these rules, claims continually arise that an agency has tried to change the issues or theories in its case and that a respondent was not given fair notice and was thereby denied a fair opportunity to present his case.[13] These cases pinpoint the deficiencies which

[13] The FTC cases alone are illustrative. *See, e.g., L. G. Balfour* v. *FTC*, 442 F.2d 1 (7th Cir. 1971); *Sunshine Art Studios* v. *FTC*, 481 F.2d 1171 (1st Cir. 1973); *Golden Grain Macaroni Co.* v. *FTC*, 472 F.2d 882, 885-86 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); *The Stanley Works* v. *FTC*, 469 F.2d 498 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973); *The Kroger Co.* v. *FTC*, 438 F.2d 1372, 1378 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971); *Tashof* v. *FTC*, 437 F.2d 707 (D.C. Cir. 1970); *Federated Nationwide Wholesalers Service* v. *FTC*, 398 F.2d 253 (2d Cir. 1968); *J. B. Williams Co., Inc.* v. *FTC*, 381 F 2d 884, 887-88 (6th Cir. 1967); *Mohawk Refining Corp.* v. *FTC*, 263 F.2d 818 (3d Cir. 1959). Similar difficulties arise on appeal when a respondent claims that an agency order is at variance with the complaint upon which the case was allegedly prosecuted. Again, Federal Trade Commission decisions outline the problem. *See, e.g., Continental Wax Co.* v. *FTC*, 330 F.2d 475 (2d Cir. 1964); *Country Tweeds, Inc.* v. *FTC*, 326 F.2d 144 (2d Cir. 1964); *Keasbey & Mattison Co.* v. *FTC*, 159 F.2d 940 (5th Cir. 1947); *Armand Co., Inc.* v. *FTC*, 84 F.2d 973 (2d Cir. 1936).

While the cases cited are from the Federal Trade Commission, the problem often arises before other administrative agencies as well. *See, e.g., Montana Power Co.* v. *FPC*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951); *N.L.R.B.* v. *Reliable Newspaper Delivery, Inc.*, 187 F.2d 547 (3d Cir. 1951); *City of Dallas* v. *CAB*, 221 F.2d 501 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 914 (1955); *Southern Louisiana Area Rate Cases* v. *FPC*, 428 F.2d 407, 428-29, n.59 (5th Cir.), *aff'd*, 444 F.2d 125, *cert. denied*, 400 U.S. 950 (1970).

exist in the manner the basic rules on notice are being applied in the administrative context.

First, the current application of the rules actually encourages agency counsel to avoid specifically delineating the theories upon which they are proceeding. In this case, for example, if agency counsel had acknowledged that they were redefining the market, they would have been required to submit the proposed amendment of the complaint to the Federal Trade Commission—just as they had been required to submit two previous amendments—and run the risk that the amendment would be denied. Moreover, if agency counsel are left free to refuse to commit themselves to specific issues, they can obtain a great litigating advantage by keeping the other side in the dark. These temptations will persist so long as agency counsel can contradict the complaint and later claim that a review of the record indicates that the presentation of evidence or the manner of cross examination constituted the giving of fair notice. The technique of proceeding by indirection—whether or not it was consciously utilized in this case—is wholly inconsistent with the basic principles of openness and candor upon which the integrity of the administrative process rests.

Second, the current application of the notice doctrines places upon a respondent in agency proceedings the full burden of guessing correctly when the possibility of new issues begins to emerge from the manner in which opposing counsel are proceeding. In preparing a defense, it can be of vital importance to know whether an issue is excluded from the Government's case, whether it is specifically included, or whether it is only peripherally involved. No longer is it possible to rely on complaints and stipulations such as those which were presumably to guide the proceedings in this case. Instead, a respondent is forced to shift approaches throughout a case to meet various possible new theories which must be inferred from the questions, demeanor, and implicit emphasis of opposing counsel.

Third, the current approach places upon reviewing courts the obligation to comb voluminous records to determine when the new issues were added to the proceeding, the degree to which the respondent below might have been aware of the addition or substitution, the adequacy of the subsequent opportunity afforded the respondent to be heard, and the relevance of possible defenses which could have been raised if notice had been given. These, of course, are precisely the types of judgments which appellate courts traditionally have attempted to avoid in the administrative arena. Not only do they constitute a waste of scarce judicial resources, they also force appellate courts to become deeply involved in complex questions which they are ill-equipped to resolve because of the difficulty of determining from a cold record the actual trial context in which events took place.

There is a simple solution to this recurring and burdensome problem. If administrative agencies were required to notify the responding party explicitly when they desire to alter any of the critical elements of a case,

then it would be a simple matter for an appellate court to pinpoint the exact time that the change in theory took place, determine the adequacy of the new notice, and ascertain whether, after the notice was given, the opposing parties had a fair opportunity to meet the new theory or issue.[14]

Application of this rule in this case would have made it unnecessary for Avnet to guess at the types of issues agency counsel were raising. The issues thus could have been presented more clearly and completely to the trier of fact, and the strange gaps in the record which even the Court of Appeals noted, 511 F.2d at 78, could have been filled in. Moreover, by providing a precise mechanism for examining the effect of a change of theory, the suggested rule would have provided a clear-cut opportunity for Avnet to demonstrate the necessity of receiving important evidence which the Examiner excluded on a piece-meal basis, without analyzing the cumulative effects of his rulings in connection with the change in theory. At the appellate level, application of the rule would have made it unnecessary for the Court of Appeals to comb the record in a search—albeit unsuccessful—for an indication of the manner in which fair notice of the change in theory was given to Avnet.

Here, the Court of Appeals avoided facing this issue squarely by ruling, in effect, that Avnet could have guessed at the existence of the new definitional issue from an analysis of the Complaint and a dissection of the evidence submitted by agency counsel. Thus, the Court ruled that Avnet might have guessed that agency counsel had discarded the Complaint's allegations con-

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[14] Indeed, this proposed approach has, on occasion, been followed by agency counsel. In *Exquisite Form Brassiere, Inc.* v. *FTC*, *supra*, an amendment to the complaint was sought at the close of the case-in-chief, and the respondent was given a fair opportunity to present evidence on the new issues.

cerning the size of the rebuilding industry because the allegation that virtually all of the sales to rebuilders were made by 16 suppliers was "arguably but by no means necessarily" a hint that a narrower definition was being constructed. 511 F.2d at 76. We submit that the United States Court of Appeals for the Second Circuit disposed of this argument properly in its opinion in *Jaffee & Co.* v. *SEC*, *supra*:

> "[A] primary purpose of the notice requirement in this case is to permit the respondent a reasonable opportunity to prepare a defense against the theory of liability invoked by those who institute the proceedings against it. A respondent may not reasonably be expected to defend against every theory of liability or punishment that might theoretically be extrapolated from the complaint or order if one were to explore every permutation of fact and law there alluded to or asserted. The Commission's proposed test would make a guessing-game of proceedings that the notice and hearing requirement are designed to rationalize." [15]

Although the type of notification suggested here is not ordinarily required in federal civil proceedings, *see* Fed. R. Civ. P. 15(b), the special nature of administrative proceedings requires a stricter rule. Unlike the situation in agency adjudications, the responding party in a civil suit has a full arsenal of discovery procedures available to him in order to help ascertain the charges against him, the theory of his adversary's case, and virtually all of the evidence which is available to the opposing party. Thus, "notice" pleading is adequate in the federal courts, for the parties can become fully informed of the intricacies of their adversary's cases by the time the trial begins. In administrative practice, however, the discovery tools available to a private party—especially those useful in

[15] 446 F.2d at 394.

defining an adversary's position—are limited. He frequently cannot serve interrogatories or requests for admissions on agency counsel to define the scope of the case against him. Moreover, since a reviewing court in an agency proceeding is severely restricted in the scope of its judicial review authority, there is all the more reason in an administrative context for strict adherence to those procedural rules which allow the parties to face the critical issues squarely and present their respective cases completely and thoroughly. Similarly, since the reviewing court in an administrative context is the sole available judicial check on agencies which combine prosecutorial and quasi-judicial functions, strict adherence to such notice requirements is essential if judicial review is to be meaningful.[16]

Clearly, no explicit notice was given in the instant case. A simple rule requiring notification could have alleviated both the unfairness to Avnet and the eventual burden placed on the Court of Appeals. Certiorari should be granted so that this Court can determine the propriety of requiring such notice, so that these serious problems will not continue to affect the fair and efficient administration of regulatory statutes.

[16] While a Rule 15(b) motion to amend pleadings may be granted by the trial judge, it is significant that in FTC proceedings, motions for amendments which are not reasonably within the scope of the complaint must be passed upon by the Commission, and not by the Examiner. For this reason, too, an analogy to Rule 15(b) is invalid. *Compare* Rule 15(b) *with* FTC Rule 3.15(a).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS CONCERNING THE PROPRIETY OF DEFINING A RELEVANT PRODUCT MARKET SOLELY ON THE BASIS OF A SUPPOSED FUNCTIONAL DIFFERENCE BETWEEN TWO GROUPS OF PURCHASERS OF IDENTICAL PRODUCTS USED FOR IDENTICAL PURPOSES

A second holding of the Court of Appeals also warrants review by this Court—its holding that a "functional difference" between two categories of customers purchasing precisely the same products for precisely the same ultimate use "provides an adequate prima facie basis for placing [the two categories of customers] in different submarkets." 511 F.2d at 78. This unprecedented holding is, we submit, contrary to accepted principles of market definition enunciated by this Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). Moreover, it is in direct conflict with a recent decision of the Ninth Circuit, *International Tel. & Tel. Co.* v. *General Tel. & Electronics Corp.*, No. 73-1513 (April 25, 1975), BNA-ATRR No. 713 at p. E-1 (May 13, 1975). It is well settled that a relevant product market must be defined in terms of the "practical indicia" of an "economically significant" submarket. 370 U.S. at 325. Agencies and lower courts should not be permitted to focus on a single factor, especially one of such dubious relevance as that chosen by the Court of Appeals, as the sole basis for defining a relevant market.

This highly questionable approach to market definition was, in a sense, a product of the procedural errors discussed in part I of this Petition. As the Court of Appeals noted, the record in this case "does not tell us what portion of the rebuilder suppliers' total sales, or even what portion of IPM's or Valley Forge's total sales, were to custom rebuilders rather than production-line rebuilders." 511 F.2d at 75. Agency counsel themselves

never attempted to show what portion of any supplier's sales were made to one group rather than the other. These and other gaps in the record resulted, we contend, because the parties were not forced to focus on what ultimately became the crucial issue in this case. In any event, the ultimate result of this manner of proceeding can be seen in the technique the Court of Appeals was forced to utilize in resolving the market definition issues: it was forced to base its market definition on a single factor which relates not to the economic realities in the market for sales *to* the two types of rebuilders, but to the manner in which resales *by* the two types of rebuilders can be distinguished.

The Court's ruling was simple. As it put it, "The custom rebuilder is primarily a retailer of services; the production-line rebuilder is a manufacturer of products which are sold largely to jobbers, and presumably to retailers as well." 511 F.2d at 78. This distinction indicated to the Court that the two types of rebuilders "perform significantly different functions and operate at significantly different levels of distribution . . . ." *Id.* Accordingly, the Court concluded that "they" could be placed in separate submarkets.

The point, however, is not whether the rebuilders, as economic entities, can be placed in different submarkets. It may well be that, as sellers of products and services, the two categories of rebuilders could be distinguished sufficiently so that *their* respective sales could be placed in separate submarkets. The question instead is whether sales *to* the two categories of rebuilders are properly segregated into different submarkets. This question does not turn on an analysis of facts which describe the economic context in which rebuilders compete with each other for sales. It turns on facts relating to competition for sales to the rebuilders. Thus, the purported "functional difference" relied upon by the Court of Appeals does not, stand-

ing alone, offer any support for an inference that suppliers of the rebuilders in both categories are not fully in competition with each other.

This was the precise holding of the Ninth Circuit in the *IT&T* case, *supra*. There, IT&T filed suit under the Sherman and Clayton Acts to challenge certain alleged anticompetitive practices by defendant GT&E in the market for the sale of telephone equipment. The District Court defined the relevant market in a way which excluded sales to all purchasers except telephone operating companies. The Court of Appeals found this definition to be erroneous. It held that sales to industrial, governmental, and other common carrier users, as well as certain potential sales to individual telephone subscribers, must also be included in the relevant market. The Court stated:

> The state of competition in the telecommunications equipment-manufacturing industry does not depend on whether the same type of equipment is purchased by a telephone operating company, a microwave common carrier, government or industry. . . . Here the telephone equipment which manufacturers sell to non-operating-company customers is not only interchangeable with equipment sold to operating companies, it is identical. It makes no difference to the manufacturer whether he sells the same piece of equipment to one type of customer or the other. To manufacturers, the only significant difference between operating-company purchases and non-operating-company purchases is that operating companies are likely to purchase in greater volume. But this difference offers no rational basis for excluding non-operating-company purchases altogether in defining the market in which manufacturers compete for sales. *International Tel. & Tel. Co.* v. *General Tel. & Electronics Corp.*, *supra*, at E-8.

This holding is in direct conflict with the ruling of the Seventh Circuit in the present case. Distinctions among

different types of customers of rebuilder-suppliers are just as irrelevant to competition among the suppliers as distinctions among telephone equipment customers were in *IT&T*. In both cases, one identical group of products was being sold to different groups of customers who used the products for identical purposes. In this case, the Seventh Circuit excluded purchases by one group of customers from the market; in *IT&T*, the Ninth Circuit found similar exclusions to be improper.

The few other cases in this area are generally in accord with the decision of the Ninth Circuit. Other courts have held that where one product, used for one purpose, is sold to two groups of customers, sales to both groups of customers should properly be treated as taking place in the same market. *Seeburg Corp.* v. *FTC*, 425 F.2d 124, 127 (6th Cir.), *cert. denied*, 400 U.S. 866 (1970); *United States* v. *International Telephone & Telegraph Co. (Canteen)*, 1971 Trade Cas. ¶ 73,619 (N.D. Ill. 1971); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 563-65 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961). As far as we are aware, until the Court of Appeals' decision in this case, no court had ever permitted a market to be defined solely on the basis of a "functional difference" between two categories of customers. In fact, in those relatively few situations in which sales of similar products to different classes of customers have been placed in separate markets, there have always been other significant factors which provide strong support for drawing a distinction. *See Columbia Broadcasting System, Inc.* v. *FTC*, 414 F.2d 974, 978-79 (7th Cir. 1969); *Reynolds Metals Co.* v. *FTC*, 309 F.2d 223, 229 (D.C. Cir. 1962).

Although the Court below hinted that its alleged "functional difference" might similarly be supported by other factors,[17] it ultimately held that a *prima facie* case was

[17] The Court of Appeals did state in a footnote that its conclusion was "buttressed" by evidence indicating that custom rebuilders rely

established by this one point alone. Thereafter, it held, the burden shifted to Avnet, and since there were crucial gaps in the record the Court concluded that the Commission's market was adequately established. Since, however, the burden of proof clearly rested on agency counsel, *United States* v. *E. I. DuPont de Nemours & Co.*, 353 U.S. 586, 593 (1957), the Court could not rest its decision on the alleged functional difference unless that difference were sufficient to define the market.

This Court's decision in *Brown Shoe*, *supra*, clearly indicated that agencies and lower courts were to engage in a detailed analysis of the relevant economic facts concerning the precise market whose boundaries are being

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primarily upon OEM wholesale distributors as their sources of supply. 511 F.2d at 78, n.22. This point was, however, mentioned only as support for the conclusion that there was a "functional" distinction between the two categories of rebuilders. It was not offered, and could not have been offered, as evidence that there was not effective competition among the various types of suppliers to the two categories of rebuilders. On this broader point, the Court clearly concluded that the record lacked adequate evidence. 511 F.2d at 74-75. In any event, the Court's discussion of an alleged price differential between two groups of *suppliers*—the wholesale distributors on the one hand and other rebuilder suppliers on the other—is irrelevant to the question before this Court. The market was not defined to exclude any category of suppliers. It was defined in a way which excluded all sales to one group of customers. It is in fact undisputed that, whatever price differentials there may be among suppliers, no supplier distinguishes in price between customers depending solely on whether the customer uses production-line of custom rebuilding techniques.

The opinion similarly cites a memorandum from an Avnet officer as "corroboration" of its conclusion that "competition for the patronage of the production-line rebuilders was of paramount importance to the rebuilder suppliers . . . ." 511 F.2d at 78-79. This memorandum, by itself, can hardly be justification for creating two separate submarkets, and the Court of Appeals does not so treat it. The decision clearly relies on the alleged functional distinction as the sole basis for its conclusion that complaint counsel had put on "an adequate prima facie case."

defined. The recent Ninth Circuit decision in *IT&T* follows this approach. Certiorari should be granted in this case to resolve the conflict between the Seventh and Ninth Circuits and to determine whether the rule as set forth in *Brown Shoe* can be undermined by allowing agencies to define a relevant market solely in terms of the identity of the customers, even though the same product used for the same purposes is sold to customers who are excluded from the market.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

ARNOLD M. LERMAN
RONALD J. GREENE
NEAL M. GOLDBERG

Attorneys for Petitioner,
Avnet, Inc.

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

May 29, 1975

APPENDIX

APPENDIX

DECISIONS BELOW

A. Court of Appeals Decision

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 73-1399

AVNET, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Argued April 10, 1974

Decided Feb. 28, 1975

* * * *

Before FAIRCHILD, Chief Judge, and PELL and STEVENS, Circuit Judges.

STEVENS, Circuit Judge.

The Commission held that the acquisition by Avnet of two competing manufacturers of parts which are sold to rebuilders of automotive electrical units violated § 7 of the Clayton Act, as amended.[1] Avnet argues that it did

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[1] The pertinent portion of Section 7 of the amended Clayton Act, 64 Stat. 112[illegible] (1950), 15 U.S.C. § 18 (1970), provides:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country,

not have a fair opportunity to meet the Commission's prima facie case because it did not anticipate the Commission's narrow definition of the relevant product market, and, in any event, that the evidence is insufficient to satisfy the Commission's initial burden on the relevant market issue. We find no unfairness in the way the case was tried and have no difficulty in concluding that the evidence adequately supports the Commission's findings.

As a preface to our discussion of Avnet's principal contentions, we shall briefly summarize the Commission's description of the industry, review the history of the proceedings, and identify the evidence which, according to Avnet, it was unable to present.

I.

Among the automobile parts which may need to be replaced or repaired as a car ages are electrical units, such as generators, alternators, starters and voltage regulators. These "automotive electrical units," ("AEU's") are made by original equipment manufacturers ("OEM's") and by rebuilders. OEM's include the major automobile companies and other firms that produce equipment for installation on new vehicles. They sell replacement units to warehouse distributors ("WD's"), who in turn resell individual units, as well as components of such units, to retailers such as repair shops, service stations, garages and car dealers.

The record in this case demonstrates that the prices at which WD's sell new AEU's are significantly higher than the prices at which comparable AEU's can be rebuilt and sold at a profit. A used unit may be dismantled, cleaned and reassembled with such substitute components

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the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The Commission's decision is reported at 82 F.T.C. 444 (1973).

as may be needed.[2] Such rebuilding may take place in repair shops where one unit at a time is put back in working order for an individual customer ("custom rebuilding"), or in a production-line operation where units are rebuilt in large quantities and then sold to jobbers for distribution to the retail trade ("production-line rebuilding"). There are about 150 or 200 production-line rebuilders in the entire country.[3]

The "rebuilders supply industry" includes the firms which sell new components to rebuilders of AEU's. Counsel for the Commission consistently contended that the industry is composed of only 16 or 17 principal manufacturers with aggregate annual sales of about $20 million.[4] The alleged violation resulted from the combination

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[2] The substitute components may themselves be either new or used or rebuilt.

[3] The parties agree that the relevant geographic market in this case is nationwide.

[4] The following table lists the firms in complaint counsel's market with their sales to rebuilders. It will be noted that the Hearing Examiner has included 17 firms, although complaint counsel initially contended that only 16 were sufficiently significant to be relevant.

Company	Sales ($000)	Market Share (%)
IPM	11,353	57.4
Ace	2,200	11.1
Valley Forge	1,856	9.4
Vulcan Motor Products	750-1,000	5.0
VMC & Rebuilders Supply Co.	1,000	5.0
Carwin Sales	511	2.6
Butts Electric Supply Co.	438	2.2
American Starter Drive Service	425	2.1
Ennis Automotive, Inc.	167	.8
Preferred Electric & Wire Corporation	100-150	.8

[Footnote continued on page 4a]

of IPM, the largest, and Valley Forge, the third largest, of these firms. Before the combination, IPM had sales of over $11 million and Valley Forge's were almost $2 million. Avnet acquired the assets of Valley Forge as of July 31, 1964, and those of IPM as of January 31, 1965. After the second acquisition, Avnet's sales represented about two-thirds of the total in the market as viewed by the Commission.

II.

Both the complaint, which issued on April 1, 1969, and the amended complaint of December 1, 1969,[5] alleged that 16 firms, of which IPM and Valley Forge were the largest and third largest, supplied virtually the total value of equipment and parts furnished to rebuilders.

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[4] [Continued]

Company	Sales ($000)	Market Share (%)
Lincoln Bearing Co.	138-165	.8
Starter Service Company, Inc.	128	.6
Los Angeles Commutator	122	.6
Precision Field Coil Co.	95	.5
Jamison Parts	less than 70	.4
Hubert Products	55.	.3
Rich Engineering Co.	46	.2
TOTAL	19,781	100.00

82 F.T.C. at 414.

In addition, the Hearing Examiner and the Commission both noted that in 1964, Ford, Chrysler and General Motors had sales to authorized rebuilders which amounted to about 3% of the foregoing total.

[5] The amendment excluded from the relevant line of commerce (1) the supply of used (as opposed to new) parts for rebuilt AEU's, and (2) the sale of parts by OEM's to "authorized rebuilders." An "authorized rebuilder" is one, who, pursuant to specific agreement with an OEM, is authorized to rebuild that firm's units. Although Avnet challenged the latter exclusion, the Commission noted that it related to only about 3% of total industry sales.

The evidentiary hearing commenced on February 1, 1971. During the preceding 16 months, the parties conducted pretrial discovery, argued about the adequacy of Avnet's compliance with discovery orders, stipulated about certain facts and issues, and agreed that, in advance of trial, each would provide the other with a list of witnesses and copies of proposed exhibits.

From the outset Avnet disputed the Commission's position that the market was composed of 16 principal firms,[6] It attempted, in three different ways, to develop evidence that the 16 firms have so many competitors that their sales do not comprise a relevant market or submarket. First, Avnet requested the Hearing Examiner to issue subpoenas to the 14 competitors of IPM and Valley Forge calling for disclosure of their customer lists, and thereafter to subpoena all those customers to learn their sources of supply. The Hearing Examiner quite properly rejected this request[7] and directed Avnet, at least as an initial matter, to make its own inquiries of the customers of IPM and Valley Forge. Second, according to Avnet's counsel, Avnet did attempt to develop evidence by a study of its own records and by interviewing its customers; presumably the results of those efforts were later incorporated in Avnet's presentation of evidence at the trial. Third, well after the trial was under way, through conversations with its sales personnel and through an independent market research study, Avnet sought to prove that the volume of business handled by custom rebuilders was so enormous that, by inference, there must be such a significant total volume of sales by rebuilder suppliers

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[6] Avnet's answer denied the allegations in paragraph 15 of the complaint. Moreover, Avnet stipulated that one of the contested issues was: "Whether sixteen firms supplied virtually the total volume of equipment and new parts furnished to rebuilders in 1964?"

[7] *See* Papercraft Corp. v. F.T.C., 472 F.2d 927, 930 (7th Cir. 1973).

that the statistics relating to the 16 firms identified by the Commission should be disregarded as essentially meaningless. The Hearing Examiner excluded the market study for procedural reasons.[8]

On the basis of the voluminous evidence in the record, the Hearing Examiner concluded that the acquisition violated § 7 of the Clayton Act and recommended an order requiring Avnet to divest IPM. He found that the relevant market included the sale of new components by rebuilder suppliers to rebuilders and that the contours of the market were fairly delineated by the sales of the 16 principal suppliers to 150 to 200 production-line rebuilders. In so finding, he resolved the "sharp disagreement between the parties over the meaning of the term 'rebuilder' as used in paragraph 1(b) of the complaint."[9] His market analysis and conclusion summarizing competitive impact of the acquisition were corroborated in large part by an opinion expressed by a Valley Forge executive in memoranda outlining the advantages to Avnet of the acquisition of IPM.

In a carefully prepared opinion by Chairman Kirkpatrick, the Commission approved the findings and order proposed by the Hearing Examiner. Commissioner Denni-

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[8] The pretrial order required Avnet to list its exhibits by January 25, 1971. The Commission completed its case on February 25, 1971, and the trial was then recessed until May 6, 1971, to give Avnet time for additional discovery and preparation. On April 19, 1971, Avnet employed United States Testing Company, Inc. to conduct a survey, but made no disclosure of that fact until July 9, 1971, when it moved to amend its list of proposed exhibits. The Hearing Examiner denied the motion as untimely, emphasizing Avnet's past failure to act with appropriate diligence and candor in the preparation of the matter for trial.

[9] *See* findings 18-40, 82 F.T.C. at 402-407, where the Examiner substantially equates the terms "rebuilder" and "production-line rebuilders," on the one hand, and "repair shops" and "custom rebuilders," on the other, to exclude custom rebuilders from the demand side of the market.

son dissented on the ground that complaint counsel had not met their burden of demonstrating the size and dimensions of the relevant line of commerce.

III.

The record contains a great deal of testimony by rebuilder suppliers and by production-line rebuilders. It is clear that the production-line rebuilders could not survive without an adequate source of supply of new parts. Because the prices charged by OEM's and WD's are so high, the production-line rebuilders must obtain such parts from rebuilder suppliers. The testimony indicates that they relied primarily on IPM, Valley Forge and two other suppliers for these parts.

Unlike production-line rebuilders, who operate at a manufacturing level and sell largely to jobbers, custom rebuilders operate at the retail level dealing directly with consumers. At that level, particularly since their charges cover their labor and specialized expertise, they can afford to purchase OEM parts from WD's. They may, of course, also purchase new, used, or rebuilt components from other sources, including rebuilder suppliers. We know that some of the rebuilder suppliers sell either nothing, or at most very little, to custom rebuilders,[10] and we also know that IPM makes some sales to custom rebuilders.[11]

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[10] The testimony of some representatives of the rebuilder suppliers made it quite clear that their sales to custom rebuilders were not significant. *See*, for example, the testimony of the witnesses Flynn (App. 591-592, 593-594), Kamber (App. 617), Green (App. 602), Winters (App. 663), and McCullough (App. 686).

[11] Since IPM has a list of 3,500 customers and since there are only 150 or 200 production-line rebuilders in the country, it is fair to infer that at least some of IPM's customers were custom rebuilders. Of course, the number of customers tells us little about their volume of purchases. There is a stipulation in the record describing IPM's sales to 49 customers with individual annual purchases ranging from $23.25 to $5,165.44. These figures are

But the record does not tell us what portion of the rebuilder suppliers' total sales, or even what portion of IPM's or Valley Forge's total sales, were to custom rebuilders rather than production-line rebuilders.

Avnet contends that such information is of critical importance in appraising the Commission's definition of the relevant market, and that it was prevented from developing such evidence as well as any other evidence identifying the dimension of the business of supplying custom rebuilders throughout the country, by the Commission's failure to give it adequate notice that the Hearing Examiner, and ultimately the Commission, would decide that the term "rebuilders" includes only production-line operators and excludes custom rebuilders. As we understand Avnet's principal argument, which is phrased in terms of a "denial of administrative due process," if its counsel had understood the theory of complaint counsel's case they would have proved (a) that for the purposes of this case, any distinction between production-line rebuilders and custom rebuilders is invalid,[12] and (b) that the in-

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to be contrasted with IPM's total sales of over $11 million. We have not found any evidence, or any offer of proof, by either party establishing the dollar value of sales by IPM or Valley Forge to production-line and custom rebuilders, respectively.

[12] In its brief at page 28 and footnote 22, Avnet states:

> "First, because Avnet lacked adequate notice, it was unable to develop and present vital evidence to support its contention that sales to all the kinds of rebuilders reflected on IPM's list of 3,500 active customers should be included in the relevant market. If the Commission's Amended Complaint had charged that only sales to a definite class of 'production-line rebuilders' were to be included in the market, Avnet would have had the opportunity to survey its active customers to ascertain which among them fit the Commission's definition of production-line rebuilders, to ascertain its sales to such rebuilders, to elicit evidence regarding their other suppliers, to demonstrate that these rebuilders compete directly with other kinds of rebuilders, and to conduct those additional inquiries which would be reasonably expected to yield relevant evidence regarding the

clusion of sales to custom rebuilders would so enlarge the relevant market as to undermine completely the Commission's prima facie case. Specifically, Avnet contends that it would not have waited so long (1) to develop evidence from its own sales personnel describing the 3,300 customers of IPM who are not production-line rebuilders, and (2) to obtain a market study delineating the volume done by custom rebuilders.[13]

> validity of the Commission's restrictive definition of the term 'rebuilder.'[22] No such discovery efforts were undertaken by Avnet—for the sole reason that it was not given fair notice by the Commission that such inquiries were either required or relevant.

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[22] Fragmentary evidence on many of these issues is contained in the record. Avnet maintains, for example, that the record demonstrates the existence of real competition for the ultimate consumer's dollar between custom rebuilt and production-line rebuilt electrical units. (*see, e.g.*, RPF 215-22, App. Vol. IV, and the transcript references contained therein.) The point in the text, however, is that Avnet was denied any opportunity during the prehearing stages of this proceeding to develop the kind of comprehensive evidence necessary to demonstrate the invalidity of the arbitrary definition of rebuilder subsequently adopted by the Hearing Examiner and the Commission."

[13] Avnet contends that its survey would have shown a market for new, rebuilt and used parts of more than $300 million and, if admitted, would have rebutted the Commission's evidence tending to prove a relevant market of only about $20 million. We have examined the study identified as Respondent's Exhibit 88 (Rejected); we find no offer of supplementary expert oral testimony. For at least three reasons, the rejected exhibit does not appear to us to be inconsistent with the Commission's analysis of the market. First, it apparently includes sales of rebuilt AEU's which include used and rebuilt, as well as new, components; second, it apparently includes sales of custom rebuilt units which include components purchased from WD's and, therefore, indirectly from OEM's; and third, its price analysis is directed to the retail market, whereas IPM, Valley Forge, and their competitors were selling to companies engaged in the manufacturing business who sold largely to jobbers, who in turn would resell to retailers. We find nothing in the study shedding any light on the magnitude of sales *at the level at which IPM and Valley Forge sold.* We are inclined to attach greater significance to Avnet's failure to make

IV.

[1] We find Avnet's "administrative due process" argument unpersuasive. It relies largely on the fact that both the amended complaint and a trade practice rule [14] promulgated by the Commission contain a functional definition of the term "rebuilder" which can be read to include custom rebuilding as well as production-line rebuilding, and on the further fact that the amended complaint described the demand side of the market as "highly fragmented," and referred to IPM's sales "to over 5,000 independent distributors and rebuilders."

Avnet had no reason to rely on the trade practice rule as significant in this proceeding. The rule relates to the manner in which rebuilt units must be labeled when they are sold. Since, by hypothesis, custom rebuilding does not involve the sale of any such unit, but rather the reconstruction of the customer's property, the rule is, in terms, inapplicable to the issue here.

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a timely offer of a breakdown of its own sales to custom rebuilders and production-line rebuilders than to any extrapolation suggested by the rejected offer.

[14] The FTC rule provides that a product cannot be identified as "rebuilt" or "remanufactured" unless it has been

> "dismantled and reconstructed as necessary, all of its internal and external parts cleaned and made free from rust and corrosion, all impaired, defective or substantially worn parts restored to a sound condition or replaced with new, rebuilt or unimpaired used parts, all missing parts replaced with new, rebuilt or unimpaired used parts, and such rewinding or machining and other operations performed as are necessary to put the industry product in sound working condition." 16 C.F.R. § 62.3(b) (1974) (footnotes omitted).

The rule also provides that units can be sold as "rebuilt" only after they have undergone this process and are labeled as rebuilt. Units which are not sold, or are not sold "to the trade," need not be labeled if it is "clearly understood by all purchasers . . . that the products, or parts thereof . . . have been used." 16 C.F.R. § 62.1 (b) (1).

Avnet's reading of the complaint was, however, reasonable. The reference to "over 5,000" customers of IPM certainly implied that all of IPM's sales were intended to be treated as within the relevant market; since presumably some of those sales were to custom rebuilders, one might well infer that the market was intended to include all custom rebuilders. But even if Avnet's counsel did originally assume that complaint counsel intended to treat all sales to custom rebuilders as part of the relevant market, it soon became manifest that the critical question in the case was whether or not counsel was correct in using the list of 16 firms to outline a relevant market. Arguably, but by no means necessarily, the answer to that question would be affected by the definition of the term "rebuilder" and, more narrowly, by whether sales to custom rebuilders would be treated as relevant. For that reason, as the Examiner found, a "sharp dispute" between the parties developed over the proper definition of that term. The portions of the record which are before us do not indicate precisely when that dispute developed. We are not at all persuaded, however, that the dispute arose so late in the proceeding that Avnet was powerless to muster evidence or argument to meet complaint counsel's case.

We note that Avnet's argument before the Hearing Examiner anticipated complaint counsel's position that only sales to production-line rebuilders were relevant.[15] We also find no discussion in Chairman Kirkpatrick's opinion for the Commission of any claim that Avnet was surprised by the definition of the term "rebuilder." The Commission did explain in detail its agreement with the Examiner's exclusion of custom rebuilding from the demand side of the market [16] and with his procedural

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[15] *See* App. 220.

[16] *See* 82 F.T.C. at 448 et seq. The Commission stated:

[Footnote continued on page 12a]

and evidentiary rulings.[17] But Chairman Kirkpatrick's opinion does not even mention the inadequate notice argument that Avnet advances in this court.

Without further belaboring the point, we merely state that our review of the record convinces us that Avnet's counsel had sufficient understanding of the issues, and sufficient time to prepare Avnet's defense, to require rejection of the argument that they were denied administrative due process when the Hearing Examiner accepted complaint counsel's definition of the term "rebuilder." The test of fairness as stated in Cella v. United States, 208 F.2d 783, 789 (7th Cir. 1953), cert. denied, 347 U.S. 1016, 74 S.Ct. 864, 98 L.Ed. 1138, and L. G. Balfour Company v. F.T.C., 442 F.2d 1, 17-19 (7th Cir. 1971), was easily met.[18]

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[16] [Continued]

> *"Throughout the proceeding below and on appeal,* respondent has contended that the term 'rebuilder' refers to all firms that engage in the physical operation of disassembling a unit, cleaning, testing, replacing or reconditioning defective or worn parts, and reassembling and testing the finished product." 82 F.T.C. at 449 (Emphasis added).

This statement provides a sufficient basis for distinguishing Rodale Press, Inc. v. F.T.C., 132 U.S.App.D.C. 317, 407 F.2d 1252, 1255-6 (1968), and Bendix Corporation v. F.T.C., 450 F.2d 534 (6th Cir. 1971), both of which involved a complete change in theory at the Commission level.

[17] *See* 82 F.T.C. at 468-473.

[18] In *Cella* we stated:

> "In an administrative proceeding it is only necessary that the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled."

In *Balfour* we stated:

> "As the Commission case against petitioners unfolded, there was a 'reasonable opportunity to know the claims of the opposing party and to meet them.'" 442 F.2d at 19.

V.

We also find no merit in the argument that the Commission relieved complaint counsel of the burden of proving the size of the relevant market and thereby deprived Avnet of administrative due process. The Examiner did not purport to make any such ruling. On the contrary, he found that the census data, the industry witnesses' testimony, the sales data for the 16 principal rebuilder suppliers, and the corroborating expressions of opinion in memoranda prepared by the witness Fischer, an executive of Valley Forge, constituted sufficient evidence on which to predicate the conclusion that complaint counsel had met their burden of proof.[19]

VI.

At pages 42-57 of its brief, Avnet argues that the Commission erred on the merits by artifically limiting the relevant market in two respects: first, by excluding sales to customer rebuilders, and second, by excluding sales of used and rebuilt parts.

[2] The second exclusion was manifestly correct. The Commission found that prices for rebuilt or reconditioned used components varied from 25% to 50% below the prices for comparable new items.[20] Moreover, it noted

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[19] In United States v. Connecticut National Bank, 418 U.S. 656, 94 S.Ct. 2788, 41 L.Ed.2d 1016 (1974), the Supreme Court characterized the quality of the government's burden of proving the contours of the relevant geographic market as its "role to come forward with evidence delineating the rough approximation of localized banking markets . . ." 418 U.S. at 669, 94 S.Ct. at 279. Presumably a similar "rough approximation" may be sufficient to make out a prima facie case on the relevant product market issue.

[20] Respondent is incorrect in its statement that the Commission ignored the fact that the commonly quoted "exchange price" for rebuilt parts includes a used core as part of the purchase price. Avnet's brief at page 55. *See* Commission opinion at 82 F.T.C. 457-458.

the absence of any substantial interaction in price between the two lines. These factors are sufficient to support the finding that they should be placed in different submarkets. *See* Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510; United States v. Aluminum Company of America, 377 U.S. 271, 276, 84 S.Ct. 1283, 12 L.Ed.2d 314; *cf.* United States v. Aluminum Company of America, 148 F.2d 416, 425 (2d Cir. 1945).

[3, 4] We are also persuaded that the omission of sales to custom rebuilders was not error. The Commission, of course, has the initial burden of explaining why a particular group of buyers or sellers should not be included within the relevant market. In this case the Commission met that burden by proving that custom rebuilders and production-line rebuilders perform significantly different functions and operate at significantly different levels of distribution within the overall market for the repair or replacement of AEU's. The custom rebuilder is primarily a retailer of services; the production-line rebuilder is a manufacturer of products which are sold largely to jobbers, and presumably to retailers as well.[21] In our opinion, the clear functional difference between the two groups of rebuilders provides an adequate prima facie basis for placing them in different submarkets.[22]

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[21] As the Commission noted in its opinion:

> "The facts found by the judge demonstrate that production-line rebuilders sell a product, not a service, to entirely different classes of customers at different distribution levels using completely different pricing methods." 82 F.T.C. at 450.

[22] This conclusion is buttressed by the fact, as stated by the Commission, that "while production-line rebuilders could not operate without a supply of new parts from rebuilder suppliers, custom rebuilders buy their new parts primarily from OEM wholesale distributors at prices 20-40 percent higher than those charged by the rebuilder suppliers." 82 F.T.C. at 450. The Commission added the following footnote at this point in its opinion:

> "[13] Although the judge in his initial decision made no finding as to the differential between the prices charged to rebuilders by wholesalers and those charged by rebuilder suppliers, the testimony cited by the judge demonstrates that WD prices to rebuilders were at least 20-40 percent higher than rebuilder supplier prices. For example, the President of Precision Field Coil noted that WD prices for General Motors' field coils were $4.41 while Precision sold to rebuilders at $2.76. (Tr. 538-39). One of the nation's largest rebuilders testified that IPM's prices were at least 20 percent cheaper than WD prices. (Tr. 843). The President of Valley Forge indicated that Valley Forge and IPM generally sold at a price 70 percent off OEM list price while jobbers sold at a 50 percent discount. (CX 37e). Thus, jobbers sold at prices over 60 percent greater than those of rebuilder suppliers."

Unquestionably the substantial price differentials make it appropriate to exclude the sales by OEM distributors to custom rebuilders from the market under study in this case. It necessarily follows, therefore, that it would have been inappropriate to include *all sales* to custom rebuilders in the relevant market.

[23] *See, e.g.*, App. 591-592, 594, 602, 617, 663, 686.

It is, of course, entirely possible that the rebuilder suppliers may sell sufficient quantities of parts to custom rebuilders at prices comparable to those charged to production-line rebuilders to support the conclusion that such sales should be treated as part of the relevant market. If that be the fact, however, since the Commission satisfied its initial burden it was incumbent upon Avnet to prove that the custom rebuilders made purchases from competitors of IPM and Valley Forge in significant volume. That burden could not be discharged by evidence concerning purchases of used or rebuilt parts, or by evidence of purchases of OEM parts from WD's. The testimony of the industry witnesses indicated that the volume of purchases by custom rebuilders from the principal rebuilder suppliers was not significant.[23] It therefore seems improbable that detailed evidence concerning the volume of sales of new parts to custom rebuilders

by rebuilder suppliers would be significant. But even assuming that it might be, Avnet did not make a timely, or a complete, offer of proof showing the amount of its own, or of any of its competitors', sales to custom rebuilders. Quite clearly, Avnet did not overcome the Commission's prima facie showing that purchases by custom rebuilders were not part of the relevant market.

The Commission's analysis of this aspect of the case is corroborated by statements made by a vice-president and director of Avnet in a pre-acquisition memorandum. That memorandum states, in part:

> The acquisition of IPM would serve chiefly to remove our most major competitor from the scene. This would reduce to an overwhelming extent the price competition that is a major factor in the industry. In many cases severe competition has held profit margins on key items to a reduced level owing to the ability of two firms to offer substantially the same item at the same price. IPM has been very active in offering preferential discounts to large customers which Valley Forge has been obliged to meet. It is recognized by both Valley Forge and IPM that we must retain a reasonable share of the business from the larger users for they represent the primary target of any substantial tooling. We both recognize that large customers are necessary for our continued growth. This has produced a situation where the large customer has used his position to play off one against the other. In this situation Maremont has been the chief offender and has used their purchasing power in the most effective manner.

Quite plainly this comment supports the inference that competition for the patronage of the production-line rebuilders was of paramount importance to the rebuilder

suppliers and tends to justify discounting the significance of their sales to custom rebuilders.

VII.

Finally, Avnet objects to the portions of the order which require (1) divestiture of IPM rather than Valley Forge, and (2) Commission approval of any acquisition by Avnet of a supplier of used or rebuilt parts during the next 10 years.

[5, 6] Deference must be accorded to the Commission in fashioning the appropriate remedy. *See* Papercraft Corp. v. F.T.C., 472 F.2d 927 (7th Cir. 1973), and cases cited at 933 n. 17. Since it was the acquisition of IPM, rather than the earlier acquisition of Valley Forge, which violated the statute,[24] and since the record indicates that Avnet has caused Valley Forge to emphasize expansion in its ignition parts business rather than the rebuilders supply business, it was manifestly appropriate for the Commission to order divestiture of IPM.

We are also persuaded that even though the competition between used or rebuilt parts and new parts is not sufficiently intense to require the former to be treated as part of the relevant market for purposes of determining whether a violation occurred, it was nevertheless permissible for the Commission to consider the significance of that competition, together with Avnet's past history of acquisitions, in defining the scope of Avnet's obligation to obtain Commission approval of future acquisitions. We are unwilling to say that this portion of the remedy does not have a "reasonable relation to the unlawful practices found to exist." Federal Trade Commission v.

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[24] Accordingly, the IPM assets have been "held . . . contrary to the provisions of [§ 7 of the Clayton Act]." *See* United States v. ITT Continental Baking Co., —— U.S. —— at ——, 95 S.Ct. 926, 42 L.Ed.2d —— (1975), and cases cited therein.

National Lead Co., 352 U.S. 419, 429, 77 S.Ct. 502, 1 L.Ed.2d 438.

Accordingly, we affirm and enter judgment enforcing the order of the Commission.

B. FTC Decision

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

* * (Caption—Dkt. 8775) * *

OPINION OF THE COMMISSION

By Commissioner Kirkpatrick

This matter is before the Commission pursuant to respondent's appeal from the administrative law judge's initial decision holding Avnet's acquisition of Guarantee Generator and Armature Co., d/b/a International Products and Manufacturing Co. (IPM), in violation of Section 7 of the amended Clayton Act, 15 U.S.C. § 18 (1970).[1]

In his initial decision, the judge found that the horizontal acquisition not only eliminated Avnet's largest

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[1] The following abbreviations are used for citations:

I.D.—Initial decision of administrative law judge (Findings cited by paragraph number; conclusions cited by page number).
Tr.—Transcript of testimony
CX—Commission exhibit
RX—Respondent exhibit
HE—Hearing Examiner's (administrative law judge's) exhibits
Res. App. Br.—Brief on Appeal of respondent
Ans. Br.—Answering brief of complaint counsel
RPF—Respondent's proposed findings
Rep. Br.—Reply brief of respondent

competitor but entrenched it as the dominant supplier of new parts, materials, and equipment to rebuilders of automotive electrical units[2] with a market share more than six times greater than that of its leading competitor.[3] In the judge's opinion, Avnet's acquisition of IPM, the largest firm in the market, only six months after Avnet had entered the market by purchasing Valley Forge (VF), the third largest supplier of rebuilders, would tend to: (1) decrease substantially the previous price competition in the industry, (2) permit a division of markets between IPM and Valley Forge, and (3) discourage new entry into an industry where barriers to entry were already formidable. Quoting from the Commission's *Papercraft* opinion, Dkt. 8879 (June 30, 1971) at p. 16, *aff'd*, No. 71-1681 (7th Cir., January 25, 1973), the judge concluded (I.D. p. 43):

> The acquisition involved in this proceeding is so far outside the pale of permissible combinations that, even if we accepted respondent's efforts to expand the

[2] The relevant line of commerce pleaded in the complaint and found by the judge (I.D. 103) is the "rebuilders' supply industry." Simply stated, that industry consists of those firms supplying new parts, materials, and equipment directly to firms engaged in rebuilding automotive electrical units. The judge also found a relevant subline of commerce consisting of the rebuilders' supply industry but excluding sales by suppliers to rebuilders that produce units for the supplier or its designee. (I.D. 104, 105). As defined in the complaint, "automotive electrical units" refers to generators, alternators, starters, starter drives, armatures, solenoids, and voltage regulators. (Amended complaint 1(a)). *See* note 21, *infra*. The geographic market, about which there is no dispute, is the nation as a whole.

[3] In his initial decision, the judge determined that the challenged acquisition increased Avnet's share of the market from 9.4 to approximately 67 percent. (I.D. 60, 131). Furthermore, the concentration ratio for the top four firms increased as a result of the acquisition from 83 to 88 percent of the market. (I.D. 131). Although these findings are based on the submarket, we note that for the line of commerce as a whole, the market-share figures would only be approximately 3 percent less. *See* page 7, *infra*.

> universe figure to double or more the figure we believe to be reasonably correct . . . , we would still be constrained to enter an order restoring the acquired firm to its former status . . . . The case law simply does not sanction acquisitions of this kind.

On the basis of the violation found, the judge issued an order requiring divestiture of IPM and prohibiting Avnet from acquiring, without prior Commission approval, any firms supplying automotive electrical unit rebuilders for a period of ten (10) years.

On appeal, respondent challenges principally the judge's definition of the relevant line of commerce, his determinations on the size of that market, and finally his finding that the acquisition tended to lessen competition. More specifically, respondent contends that the relevant market should include: (1) the sales to all categories of automotive electrical unit rebuilders, not just those who rebuild on a "production-line" basis (Res. App. Br. at 10-17; Rep. Br. at 2-6); (2) the sales of used and rebuilt as well as new components utilized in rebuilding (Res. App. Br. at 17-28; Rep. Br. at 3); and (3) sales of original equipment manufacturers' (OEMs) new parts by wholesale distributors (Res. App. Br. at 28-32; Rep. Br. at 3). The respondent also argues that the evidence on the size of the market presented by complaint counsel is extremely unreliable and that, therefore, surveys of respondent which allegedly represent a more complete analysis of the market were wrongfully excluded. (Res. App. Br. 40-53; Rep. Br. 5-15). Finally, respondent contends that the judge placed undue weight on pre-acquisition documents prepared by Avnet executives in evaluating the probable anticompetitive effects of the merger. (Res. App. Br. 55-59; Rep. Br. 15-20).

We have carefully considered all of respondent's arguments in light of the record and the initial decision and

have concluded, for the reasons stated below, that the judge's findings and conclusions are fully supported by the evidence and applicable case law. Therefore, we hereby adopt, except to the extent noted in this opinion, the findings and conclusions contained in the initial decision and the order prepared by the judge.

I. The Rebuilding Industry and Its Suppliers of New Parts

The rebuilding of automotive electrical units [4]—generators, starters, voltage regulators, and, in more recent years, alternators—grew out of the depression. At that time, the economic situation created a unique opportunity for those entrepreneurs who could rebuild an electrical unit with parts salvaged from several used inoperative units (referred to by the industry as "cores") and sell their product at a fraction of the price of a new unit. Today, with the technological sophistication of the industry, the increased consumer acceptance of rebuilt automotive units and the availability of new and rebuilt component parts, the rebuilder has become, in a very real sense, a manufacturer with a special niche in the automotive aftermarket. Because rebuilders provide the motoring public with a cheaper alternative of comparable quality to the new units produced by the OEMs [5], the re-

[4] Today, components of these four electrical units, such as armatures, rotors, solenoids, starter drives and stators, are also rebuilt on a major scale. (Rebuilt armatures, rotors, and stators are commonly designated "rewound.") These rebuilt components are largely produced for the purpose of being incorporated into the larger units by a rebuilder, although some are sold directly into the automotive aftermarket as finished goods. Consequently, there are today two levels in the rebuilding industry, one supplying the other. Several large rebuilders operate exclusively at one level, while others produce both rebuilt component parts and larger rebuilt units.

[5] Rebuilt units are generally sold to the consumer at prices 30-40 percent below those of OEM new units. (Tr. 795, 884, 895). Host rebuilders of automotive electrical units consider their products to

building industry represents a viable competitive challenger in at least one small segment of the automotive replacement parts market to the general OEM dominance in the automotive aftermarket.

While many factors account for the meteroic rise of the automotive electrical rebuilding industry in the past quarter century, none is more important than the development of sources of supply for the full range of new parts required in rebuilding. Unlike his predecessor of the 1930s, the modern rebuilder need not resort to cannibalizing parts from several cores to rebuild a single unit. (Tr. 1574). He is now able to operate on a much more efficient production-line basis, rebuilding each used core into a finished unit; because he can supplement his inventory of component parts with new parts when sufficient used parts cannot be salvaged from cores received in exchange from customers or purchased from junk dealers. (I.D. 20-26).[6] Likewise, the availability of certain new parts which are seldom salvageable in reusable form, such as brushes and bushings, has permitted the rebuilding industry to produce rebuilt units comparable in quality to new replacement units. (Tr. 794-95). But, perhaps the most important result of the development of the rebuilder supply industry is that today's re-

be comparable in quality, if not better, than new units which are manufactured by the OEMs. (Tr. 651, 757, 795, 895). Furthermore, rebuilt units sold by most rebuilders today carry warranties that, if anything, are better than the 90-day coverage offered by the OEMs for new replacement units. (Tr. 651, 757).

[6] The entire rebuilding industry operates on an "exchange" basis. That is, rebuilders sell to their customers, mostly wholesale distributors or jobbers, who generally return to the rebuilder a used core in partial payment for each rebuilt unit. Thus, the rebuilder has a constant source of supply for the most basic item in rebuilding—the used core. Since rebuilders can continue to operate on a production basis only with a continuous supply of used cores, their operation depends in large part on their ability to rebuild a unit from a single used core. (Tr. 815-16, 919-20, 1574).

builders can produce rebuilt late model units years before cores and used parts are available from the junk yards.[7]

Consequently, the suppliers of new parts to rebuilders hold the key to this industry. The industry can only exist if new parts are available at prices sufficiently low so that the rebuilder will be able to sell the finished product on the market at a price substantially below that for new units.[8] The OEMs, however, have consistently followed a policy of not selling directly to rebuilders other than those rebuilding units for them (so-called "authorized rebuilders"). Rebuilders are able to obtain OEM new parts from wholesale distributors (WDs); but, as virtually every rebuilder who testified in this proceeding indicated, WD prices are so high that rebuilders could not produce a rebuilt unit for less than a new one if they had to buy exclusively from wholesalers. (I.D. 99). Consequently, a small group of rebuilder suppliers, led by IPM and Valley Forge, has essentially been the sole source of new parts for rebuilders since the inception of the rebuilding industry in the 1930s.[9] As one

[7] Mr. Fischer, the President of Avnet's Valley Forge Division, noted the vital role of rebuilder suppliers in making parts available for late model units:

> When original equipment [sic] changes basic parts in a new model, the rebuilder cannot secure these until the units hit the junk yards and this takes time. It is in this interval of time that VF [Valley Forge] and IPM serve their largest function. (CX 37f).

[8] As one experienced rebuilder testified:

> Q Why in your opinion do rebuilders exist today?
> A Because of price. Only because of price, as compared with OEM . . . . If it ever became where a rebuilt unit irrespective of its quality could not be bought cheaper than a brand-new unit, then the rebuilding business would stop. (Tr. 795-96).

[9] It is indeed ironic that the predecessor of IPM actually entered the rebuilder supply business to compete with Valley Forge, the principal supplier in the mid-1930's, because Valley Forge refused to sell new parts on other than a cash or c.o.d. basis. (Tr. 1572). And, during World War II, IPM was the first supplier to realize

major rebuilder testified with reference to IPM and Valley Forge and their leading competitor, Ace: "I doubt if we could have existed if it had not been for the three." (Tr. 798).

II. The Relevant Product Market

The judge found the relevant line of commerce to be "direct sales by rebuilder suppliers of new parts, materials and equipment to rebuilders." (I.D. 103, pp. 38-41). In addition, he concluded that a relevant subline of commerce existed consisting of all sales of new parts, materials, and equipment to rebuilders excepting direct sales by OEMs to their authorized rebuilders. (I.D. 104, 105). The geographic market, about which there is no dispute between the parties, is the United States as a whole. (I.D. 106).

Recognizing that respondent's market share as a result of the acquisition is considerably greater than that sanctioned under any Section 7 precedent, Avnet on appeal raises a series of objections to the judge's definitions of the relevant market and submarket. Since we note that the judge's submarket decreases the total market by only $610,000 or approximately 3 percent (I.D. 77), we will confine our review to those issues which relate to the overall market.

the potential for tremendous growth in the parts business if rebuilders had a full line of new parts at reasonable prices so that they would no longer have to cannibalize several cores to make a single unit. (Tr. 1574). Thus, from the very beginning of the rebuilding industry, competition among the suppliers of the industry has been an important factor in its development.

A. *The Demand Side of the Market*

1. *Definition of "Rebuilder"*

Throughout the proceeding below and on appeal, respondent has contended that the term "rebuilder" refers to all firms that engage in the physical operation of disassembling a unit, cleaning, testing, replacing or reconditioning defective or worn parts, and reassembling and testing the finished product. (I.D. 18). Thus, respondent argues that the definition of "rebuilder" in the complaint should include not only "production-line" rebuilders but all types of automotive repair firms—service stations, general repair garages, vehicle dealers, electric specialty shops, and fleet maintenance facilities. (Res. App. Br. 10-17; Rep. Br. 2-6).

Admittedly, many types of repair shops engage in rebuilding on an individual unit basis (termed in the trade "custom rebuilding"), which involves the same basic process and parts employed in "production-line" rebuilding.[10] As the judge below found, however, fundamental differences exist between production-line rebuilders and repair shops with respect to the nature of their business operations, their methods of pricing, their types of customers, and the degree of their dependency on specialized rebuilder suppliers. (*Compare* I.D. 19-33 *with* I.D. 34). Furthermore, the industry itself clearly recognizes the basic practical difference between production-line and custom rebuilders as demonstrated not only by the testimony of several major rebuilders (Tr. 647-49, 718, 853-

[10] We cannot agree with respondent's contention that the fact that several production-line rebuilders engage in some custom rebuilding, primarily of heavy-duty units, renders the judge's distinction between production line and custom rebuilding untenable. (Res. App. Br. at 12-13; Rep. Br. 3-4). The judge, in fact, found that the custom rebuilding performed by production-line rebuilders was generally for the convenience of their customers and accounted for less than 5 percent of their business. (I.D. 31).

54, 826, 1295, 2310-11, 4627) but also by the existence of a separate trade association limited to production-line rebuilders and their suppliers.[11] (RX 55e).

The significance of the distinction between production-line and custom rebuilding in determining the relevant line of commerce lies in the fact that production-line rebuilders are manufacturers that sell completed units at an established price for distribution into the automotive aftermarket, primarily through wholesale distributors. (I.D. 26, 32). Custom rebuilders or repair shops, on the other hand, actually perform a service. Custom rebuilders do not prepare a unit for sale but rather repair the particular unit and return it to the customer, generally the vehicle owner, charging him on a parts and labor basis. (I.D. 34(a), (d), 37, 39, 42). Perhaps most significant in this proceeding is the fact that, while production-line rebuilders could not operate without a supply of new parts from rebuilder suppliers, custom rebuilders buy their new parts primarily[12] from OEM wholesale distributors at prices 20-40 percent higher than those charged by the rebuilder suppliers. (I.D. 34(e)).[13]

[11] As the executive secretary of the trade association testified (Tr. 2979):

> We generally define a rebuilder as a firm substantially engaged in rebuilding on a production scale automotive parts for use in the after market distribution channels. Production scale would generally refer to a firm who was substantially engaged in the promotion of the industry.

[12] We do not disagree with respondent's assertion that rebuilder suppliers do have some sales to repair shops. (Res. App. Br. 11-12). The rebuilder suppliers cited by respondent, however, had very limited occasional sales to a limited number of repair shops. (Tr. 1078-79, 1155, 1462-63, 2142; CX 290). Furthemore, there is no basis in the record for respondent's contention that 2,000 of IPM's active customers were repair shops or that 700 were service stations. (Tr. 2268). *See* discussion at pp. 36-37, *infra*.

[13] Although the judge in his initial decision made no finding as to the differential between the prices charged to rebuilders by whole-

For these reasons, we cannot agree with respondent's contention that the Commission's decision in *Papercraft*, Dkt. 8779 (June 30, 1971), pp. 7-8, *aff'd*, No. 71-1681 (7th Cir., January 25, 1973), supports a broadening of the line of commerce to include sales to custom rebuilders. The facts found by the judge demonstrate that production-line rebuilders sell a product, not a service, to entirely different classes of customers at different distribution levels using completely different pricing methods. Thus, unlike the situation in *Papercraft* where a dramatic shift in the market share from one type of retailer to another strongly indicated direct competition, competition between these two categories of rebuilders seems at best very indirect.

Furthermore, the tremendous disparity between the production-line rebuilders' dependence on rebuilder suppliers and the custom rebuilders' reliance on wholesalers, despite the fact that wholesalers charge a substantially higher price, indicates that sales to these two categories of rebuilders are in different lines of commerce. As the D. C. Circuit observed in *Reynolds Metals Company* v. *FTC*, 309 F.2d 223, 229 (1962):

> We think price differentials have an important if not decisive bearing in the quest to delimit a submarket. No prudent businessman (the ordinary end user of foil), would purchase colored or embossed

salers and those charged by rebuilder suppliers, the testimony cited by the judge demonstrates that WD prices to rebuilders were at least 20-40 percent higher than rebuilder supplier prices. For example, the President of Precision Field Coil noted that WD prices for General Motors' field coils were $4.41 while Precision sold to rebuilders at $2.76. (Tr. 538-39). One of the nation's largest rebuilders testified that IPM's prices were at least 20 percent cheaper than WD prices. (Tr. 843). The President of Valley Forge indicated that Valley Forge and IPM generally sold at a price 70 percent off OEM list price while jobbers sold at a 50 percent discount. (CX 37e). Thus, jobbers sold at prices over 60 percent greater than those of rebuilder suppliers.

> foil at prices on this record of $1.15 to $1.22 per unit when another foil converter market offers florist foil, similarly colored or embossed, and of similar gauge and weight, at a cost of only $.75 to $.85 per unit. The fact that prudent businessmen do so supports the inference, drawn in the negative since as we have noted the record lacks affirmative evidence on the point, that florist foil must be distinct and separable from aluminum foil generally or the many users of the latter would have long ago begun to substitute the former at the lower price. Such a difference in price as appears on this record must effectively preclude comparison, and inclusion in the same market, of products as between which the difference exists, at least for purposes of inquiry under Sec. 7 of the Clayton Act.

Certainly, under the D. C. Circuit's reasoning in *Reynolds Metals*, no prudent businessman engaged in custom rebuilding would continue to purchase new parts from wholesalers if he was in direct competition with rebuilders who purchased their new parts at prices substantially lower than those charged by wholesalers.

2. *"In-House" Manufacturing of New Parts by Rebuilders*

Respondent also disagrees with the judge's exclusion (I.D. 104) of the production of new parts by various rebuilders for use in their own rebuilding operations. (Res. App. Br. 36-37).[14] Avnet contends that in-house manufacture of components competes directly with the sale of such components by outside suppliers and that, therefore, parts manufactured "in-house" by rebuilders should be included in the market. Respondent asserts that

[14] We note that the judge in his initial decision did not actually discuss the issue of "in-house" supply of new parts but did, in fact, exclude "in-house" supply by limiting the relevant market to "sales." (Res. App. Br. at 36).

testimony in the record refers to numerous instances where rebuilders have shifted back and forth between purchasing from outside sources and manufacturing "in-house" depending on varying conditions of price, quality, and availability. (Res. App. Br. at 37).[15]

Contrary to respondent's argument, we find that the record in this case amply demonstrates that "in-house" production does not effectively compete with sales of new parts by rebuilder suppliers and that, in fact, it is extremely difficult for the overwhelming majority of rebuilders to supply any significant portion of their requirements of new parts. This is demonstrated not only by evidence of the substantial investment required to "tool up" for new parts production and the substantial risks

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[15] The testimony cited by respondent to show that rebuilders shift between "in-house" production and purchasing from outside sources largely relates to rebuilt, rather than new, parts. *See* RPF 151-152. (Tr. 608, 625-27, 658-59, 760, 809, 867-69, 1288, 2837, 3425, 3454-55). While the record does show that in 1964 some rebuilders manufactured their own field coils and that one fairly large rebuilder produced new commutators, the record also shows the very real limitations on the ability of rebuilders to manufacture these parts themselves. Champion Armature, which manufactured its own commutators, was cut off by Anaconda, its supplier of "bar stock," in 1967 when its purchases dropped and was forced to discontinue commutator manufacturing because it could not obtain bar stock without paying a premium. (Tr. 627). With regard to field coils, Mr. Gordon of Ace, whose entire business centered on the sale of field coils (CX 44a-b), testified that by 1964, high labor costs effectively prohibited "in-house" production (Tr. 1170):

> Q In 1964 to your knowledge did any rebuilders wind their own field coils?
>
> * * * *
>
> A I don't know. I know that prior to '64 they did and then they had to quit it because it was too expensive for them to wind their own unless the owners' wives came down and didn't have anything to do and they didn't have to pay them and they wound the coils for them, but that is about the only way. But if they had to pay 75 cents or a dollar o[r] $1.25 an hour, it wasn't worthwhile for them to wind their coils.

involved,[16] but also by the fact that respondent identified only six rebuilders out of some 150-200 firms engaged in automotive electrical unit rebuilding in 1964 that manufactured any of their new parts requirements.[17]

In fact, a mere listing of the vertically integrated firms named by respondent in its brief (Res. App. Br. at 37) demonstrates how unique "in-house" production of new parts really is in the rebuilding industry. Respondent lists only five firms—the Delco-Remy Division of General Motors, Robert Bosch, American Starter Drive, Carwin, and Accurate Parts. With the exception of Accurate Parts, the world's largest rebuilder of a very narrow line of specialized products,[18] all rebuilders listed by respondent manufacture new parts primarily for purposes other than for supplying their own rebuilding operations. Thus, Delco-Remy and Robert Bosch, which are engaged principally in the manufacture of original equipment units (I.D. 81-85), use some small percentage of

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[16] The cost of tooling for manufacturing any significant portion of the broad range of parts required by rebuilders is substantial. *See* pp. 42-43, *infra*. Mr. Fischer, the President of Valley Forge, estimated that a minimum investment in tooling of $3-4 million would be necessary to produce a broad, but not complete, line of new parts. (Tr. 4170, CX 44a). A 1964 study by Vulcan concluded that three quarters of a million to a million dollars would be required to "tool up" to enter the alternator parts business. (Tr. 992).

[17] We do not include among the six rebuilders those rebuilders who may have made some of their own field coils as late as 1964. *See* note 15, *supra*.

[18] Accurate Parts is the world's largest rebuilder of starter drives and starter solenoids, which are components of starters. (RX 15d). In 1964, its sales of rebuilt starter drives alone was $2.2 million (Tr. 4665), which is greater than the total sales volume of many of the nation's largest rebuilders, even though the other rebuilders sell a much broader line of products. For example, Standard Automotive Components, which ranked among the top ten rebuilders, had sales in 1964 of $1.178 million (Tr. 836); Automotive Armature, also in the top ten, had sales of $1.119 million in that year. (Tr. 1289).

the new parts they manufacture in their rebuilding operations.[19] American Starter Drive and Carwin, which are two rebuilder suppliers, manufacture new parts primarily for resale or for use in manufacturing new units.[20] The fact that virtually the only vertically integrated rebuilders in the industry are those with a substantial market for new parts other than for use in their own rebuilding operations demonstrates that real barriers exist which preclude the overwhelming majority of rebuilders from engaging in "in-house" production of new parts.

In analogous situations, the courts have excluded "in-house" production from the relevant line of commerce.

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[19] As the judge found, Delco-Remy's (D-R) rebuilding operation was so incidental to its production of new units that D-R's purchasing decisions were made solely on the basis of new-unit production. The rebuilding operation simply drew upon new parts in D-R's stock used to manufacture new units, and no separate accounting was made to distinguish the use made of the parts. (I.D. 82).

Robert Bosch GMBH is a world-wide manufacturer of original equipment that sells electrical units in the United States through a subsidiary, Robert Bosch Corporation of the United States, for Volkswagen, Mercedes-Benz, Volvo, Porsche, Saab, Ford Pinto, Lincoln Capri, and Opal. In 1964, the American subsidiary engaged in some rebuilding using only parts imported directly from Bosch's foreign plants. (I.D. 83-85).

[20] American Starter Drive in 1964 sold to rebuilders $415,000 in rebuilt starter drives and $425,000 in new components for starter drives. (Tr. 1017-18, 1028-29). Since the cost of new parts used in rebuilding usually represents 15-35 percent of total sales of rebuilt units (I.D. 109), we find that the overwhelming majority of new starter drive components were manufactured by American for sale to rebuilders rather than for use in its own rebuilding operation.

In 1964, Carwin was primarily engaged in the manufacture of new solenoids for which it made most of the component parts. While Carwin also rebuilt solenoids for sale to rebuilders, rebuilt solenoids accounted for only a quarter of Carwin's total solenoid production (Tr. 1182-83). In addition, Carwin sold $170,000 in new solenoid components, of which it manufactured 60 percent. (Tr. 1194).

In the leading case, *United States* v. *Greater Buffalo Press*, 402 U.S. 549 (1971), the Supreme Court recognized the relevant line of commerce, the independent color comic supplement printing business, as one separate from the "in-house" printing of color comic supplements by the newspapers themselves. Both the Supreme Court and the District Court excluded "in-house" printing because of the greater skill and specialized machinery necessary to produce quality color supplements and the cost savings inherent in printing such supplements on a high-volume basis. *U. S.* v. *Greater Buffalo Press, Inc.*, 402 U.S. at 555 (1971); *U. S.* v. *Greater Buffalo Press, Inc.*, 327 F. Supp. 305 at 307-09 (W.D.N.Y. 1970). Both courts acknowledged the fact, however, that a substantial number of newspapers printed color comic supplements themselves and that even those newspapers that did not would do so "if at any time the cost of purchasing such color comic supplements exceeds the cost to the newspaper of printing them." (*Id.* at 307-08). *See also, United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 356-57 n.33 (1963).

Nor do we find the decision of the District Court in *United States* v. *International Telephone & Telegraph Corp.* (ITT-Canteen), 1971 CCH Trade Cas. Par. 73,619, at 90,539-45 (N.D. Ill.) inconsistent with the judge's exclusion of "in-house" production from the market. In *ITT*, the court's determination that "in-house" food service should be included in the relevant market was based on the finding that in the Chicago area, 14% of the food centers at plants, 42% of those at schools, and 52% of those at hospitals were operated by the institution. *Id.* at 90,542. In the Court's view, the substantial percentage of institutions engaged in "in-house" food service confirmed expert testimony indicating that food-service operations by institutions were an important competitive factor in the overall food-service industry. In the present

case, however, the facts dramatically demonstrate that "in-house" manufacture of new parts is unique and is almost exclusively limited to those rebuilders that have entered the rebuilding field as an outgrowth of their substantial new-part manufacturing operations.

B. *The Supply Side of the Market*

1. *Used and Rebuilt Parts*

Ignoring the overwhelming evidence on the record indicating that the rebuilding industry exists solely because of its ability to assemble units from the least expensive components and thereby sell its product at a price substantially below that of new units, respondent contends that used cores and parts, together with rebuilt and reconditioned parts, compete "directly and effectively" with substantially more expensive new parts (Res. App. Br. 20-28). Respondent argues that the judge's findings and conclusions, excluding sales of used cores and parts and rebuilt parts, are therefore unsupportable and "ignore[s] the dynamics of the rebuilding industry." (Res. App. Br. at 20). This argument would certainly astound the rebuilders who testified in this proceeding.[21]

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[21] Respondent also contends that the judge in his initial decision excluded five components of electrical units—armatures, rotors, solenoids, starter drives, and stators—from the product market by defining them as "units" rather than "parts." (Res. App. Br. 18-20). Actually, these components can be considered either "parts" or "units" depending on the context in which they are used. Rebuilders of components consider them "units," but rebuilders that incorporate these components into larger units consider them "parts." (Tr. 773, 1183). Therefore, we find that the judge's definition of "units" as "any item sold separately by a rebuilder" (I.D. 43) and his definition of "parts" as "any item purchased by a rebuilder for incorporation in units which he rebuilds" (I.D. 44) reflect the recognized usage of those terms in the trade.

The mere fact that the judge listed a series of examples of "units," which included these components, but listed no examples in his definition of "parts" certainly does not indicate, as respondent argues, that the judge did not consider these components "parts"

In fact, the record amply demonstrates that the purchasing decisions of rebuilders are made basically on considerations of availability which in turn are premised on the very substantial differentials in price among used, rebuilt, and new parts.[22] Rebuilders will generally purchase used parts if they are available in preference to rebuilt or new components. (I.D. 52). When used parts are not available, rebuilders will turn to rebuilt parts suppliers (I.D. 57). Only if neither used nor rebuilt parts are available will rebuilders resort to new parts. (I.D. pp. 39-40).

The rebuilders' main source of used parts is used cores obtained primarily from their customers in ex-

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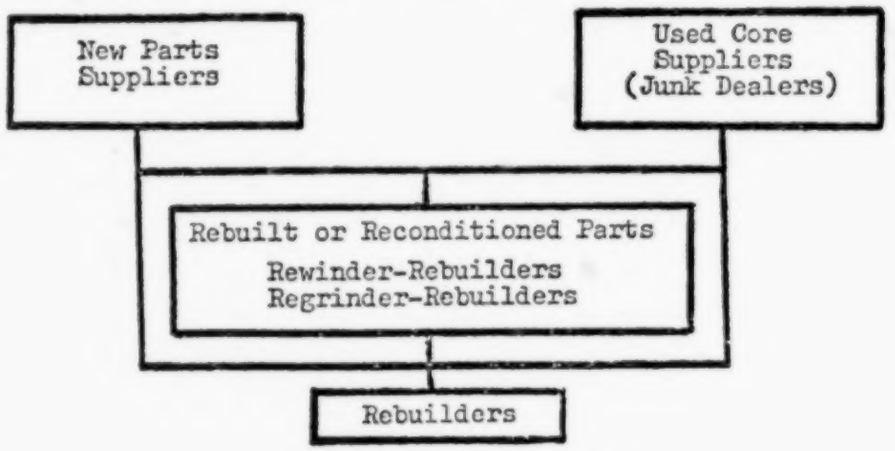
when they were purchased by a rebuilder for incorporation into a larger unit. In fact, the judge parenthetically noted that suppliers of rebuilt parts included "rewinders of armatures, rotors and stators" and included Carwin's sales of new solenoids in his computation of market shares. (I.D. 58, 60 n.2). While respondent attempts to support its strained reading of the initial decision by claiming that the judge erroneously excluded Bendix's sales of starter drives to rebuilders (Res. App. Br. at 19 n.15), the record clearly shows that these drives were *not* incorporated into rebuilt starters (Tr. 3081) and thus were not "parts" under the judge's definition.

[22] The following chart illustrates the relationship of the rebuilders' principal sources of supply (I.D. 47):



change for rebuilt units and, to a lesser extent, from junk dealers, affectionately called "junkies."[23] Rebuilders disassemble the cores to recover the individual parts which, in turn, are sorted, cleaned, inspected, tested, and then commingled with other similar parts for use in the rebuilding process. (I.D. 45).

While respondent acknowledges that "the apparent price of parts contained in a used core is always substantially lower than the price of the same components new, rebuilt, or reconditioned" (Res. App. Br. at 25), it contends that the price discrepancy found by the judge is actually considerably less because of the cost of labor necessary to salvage a part from a used core. In fact, the judge's finding that used items sell at 25-50 percent of the price of a comparable new part is based primarily on testimony comparing new part prices with prices for individual used parts extracted from cores by the junkie. (I.D. 52). For example, one rebuilder cited by the judge testified that used end plates for generators were available at the time of the proceeding for 15 cents compared to $1.00 to $1.50 for comparable new end plates. (Tr. 782-84). Furthermore, the President of Avnet's Valley Forge Division indicated that used cores containing several salvageable parts often sell below the price for a single new part and that junk dealers who themselves break down the cores to salvage individual parts

[23] Junkies market their product in a manner completely different from new-parts suppliers. First, they generally sell whole cores, not individual parts. (I.D. 48). Second, they tend to sell on a local or regional basis whereas new-parts suppliers compete on a nationwide basis. (I.D. 49). Third, junkies do not maintain a stock of various kinds of cores but dispose of cores as soon as possible. (Tr. 600). Fourth, unlike the new-parts suppliers, junkies sell on an "as is" basis without any guarantee of quality. (Tr. 600-01, 693). Fifth, junk dealers have no salesmen and provide no promotional services such as those often performed by new-part suppliers' salesmen. (I.D. 53). Sixth, junkies do not have price lists but sell at the highest price offered by their customers. (I.D. 53).

are able to sell used parts at prices 65-75 percent lower than those charged by Valley Forge. (Tr. 4061-62). Thus, the judge's finding and the evidence on the record clearly indicate that the cost of salvaging parts from used cores is insignificant compared with the substantial price differential between used cores and the total new-part price of all the component parts which usually can be salvaged from used cores.[24]

Were used parts and cores in the same market with new parts, one would expect to find a substantial interaction in price between the two. In fact, as the judge found (I.D. 54) and the record again amply demonstrates, the prices for new parts are relatively stable with a slight increase over time while used items and cores decrease substantially in price as time passes and more used cores are available to the junkyards.[25] While respondent refers to a few isolated excerpts from the record to indicate that price sensitivity actually exists (Res. App. Br. 26-27), most of the testimony cited tends to confirm, not rebut, the judge's finding. Thus, the testimony of Avnet's two vice-presidents indicated that as used parts became plentiful, their price fell well below the cost of manufacturing a new part (Tr. 4061), sometimes to the extent that IPM could not sell the new parts even at reduced prices and "ended up selling approximately eight or nine tons of end plates and stuff for

[24] Respondent's argument (Res. App. Br. at 26) that used parts compete with new ones on the basis of differences in quality—citing its Proposed Findings of Fact (RPF 108, 109, 119)—is indeed curious in light of the statement contained in paragraph 106 of its Proposed Findings: "Such used parts are generally considered substantially the same in quality as their new equivalents." We feel that the latter statement substantially reflects the evidence in the record.

[25] The wide fluctuation of the prices of used parts and cores is illustrated by the fact that used generator core prices vary from one to ten dollars. (Tr. 805).

scrap . . . ." (Tr. 1675). That is not price sensitivity but the bottom falling out of the market.

Substantial price differentials also distinguish the sales of rebuilt and reconditioned parts from the sales of new parts. On the basis of substantial evidence on the record, the judge found that rebuilt parts generally sell for 25-50 percent less than comparable new parts and that rebuilders purchased rebuilt parts whenever they were available in preference to new parts. (I.D. 57).[26]

Respondent contends, however, that the "price differences that exist between rebuilt and reconditioned parts and their new equivalents are not differences in real cost to the rebuilder" because the price ordinarily quoted for rebuilt parts is an "exchange price" which presumes the return of a used core by the customer. (Res. App. Br. at 21; Rep. Br. at 7-8 n.16). Respondent is correct in asserting that if the value of the used core were added to the price charged by the supplier of the rebuilt part, the disparity in price between rebuilt and new parts would be reduced. However, respondent's contention again ignores the dynamics of the rebuilding industry. The evidence in the record demonstrates that customers of rebuilders in the overwhelming majority of cases return cores to the rebuilder in order to receive the exchange price. As the judge found, approximately 85 percent of

[26] To dispute the judge's finding of a substantial price differential, respondent cites testimony that two suppliers sold rebuilt and new starter drives at the same price and that new Japanese bearings sell at prices equal to those of reground bearings. (Res. App. Br. at 21). However, the testimony of the two starter-drive rebuilders, in fact, indicates that they sold all products as rebuilt even when they were unable to fill an order with a rebuilt drive and had to purchase a new one to keep the customer content. (Tr. 1052; 4624-25). Respondent's assertion about the price of Japanese bearings is true today. But, Japanese bearings were just entering the American market in 1964 so that at that time most rebuilders preferred reground bearings over new because of the substantially lower price. (Tr. 697, 715, 731, 1000, 4599-4600).

the cores used in rebuilding are obtained from the rebuilder's customers. (I.D. 45).

This practice comports with the basic rationale of the rebuilding industry. To a rebuilder of generators, an armature core has little value since it cannot be utilized in rebuilding generators until it is rewound. But, to a rewinder (who is a type of rebuilder of component parts), armature cores provide the very foundation of his business. Consequently, to the rebuilder of generators, who himself receives used generators containing armature cores in exchange from his own customers, armature cores are of little value except to the extent that he can use them to decrease the cost of obtaining rebuilt armatures. Therefore, it is to the generator rebuilders' advantage to purchase on an exchange basis whenever possible.[27]

In view of the fact that the entire rebuilding industry exists because of its ability to sell its product at a price substantially below that of new units and that, therefore, the predominant factor in choosing between alternative sources of supply is price, we find that the substantial price differences between new and used and new and rebuilt parts establishes the sales of new parts as a distinct market. The facts found by the judge in his initial decision are so analogous to the facts relied upon by the Supreme Court in *United States* v. *Alcoa*, 377 U.S. 271 at 276 (1964), that the language of the court in separating insulated aluminum conductor from insulated

[27] Although the judge made no findings with respect to price sensitivity between rebuilt and new parts, we note that the testimony in the record tends to indicate that the principal determinant of rebuilt parts prices is the cost of the used core. Thus, the price of rebuilt parts will generally decrease substantially over time as used cores become plentiful and the price of the core drops. (Tr. 2451, 2455-56). In contrast, as we noted above, new part prices remain relatively stable over time with a slight upward trend.

copper conductor and placing it in another submarket is appropriate:

> The price of most insulated aluminum conductors is indeed only 50% to 65% of the price of their copper counterparts; and the comparative installed costs are also generally less. As the District Court found, aluminum and copper conductor prices do not respond to one another.
>
> Separation of insulated aluminum conductor from insulated copper conductor and placing it in another submarket is, therefore, proper. It is not inseparable from its copper equivalent though the class of customers is the same. *The choice between copper and aluminum for overhead distribution does not usually turn on the quality of the respective products, for each does the job equally well. The vital factors are economic considerations.* It is said, however, that we should put price aside and *Brown Shoe, supra,* is cited as authority. There the contention of the industry was that the District Court had delineated too broadly the relevant submarkets—men's shoes, women's shoes, and children's shoes—and should have subdivided them further. It was argued, for example, that men's shoes selling below $8.99 were in a different product market from those selling above $9. *We declined to make price, particularly such small price differentials, the determinative factor in that market. A purchaser of shoes buys with an eye to his budget, to style, and to quality as well as to price. But here, where insulated aluminum conductor price-wise stands so distinctly apart, to ignore price in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business.* (Emphasis added.) *See also Reynolds Metals Co.* v. *FTC,* 309 F.2d, 223 at 229 (D.C. Cir. 1962).

2. *Exclusion of Sales to Rebuilders of OEM New Parts*

We note at the outset that OEMs sell to rebuilders only through wholesale distributors and jobbers except for those "authorized rebuilders" engaging in rebuilding for the OEMs. Furthermore, despite respondent's contentions to the contrary, (Res. App. Br. at 30-32). OEMs do not consider rebuilder suppliers as competitors. In fact, the memoranda by Ford and General Motors referred to by respondent indicate that these two companies do *not* regard themselves as competitors of IPM or Valley Forge. (CX 286, RX 69). The Ford memorandum discussing sales by these two divisions of Avnet actually states that the divisions ". . . do not compete directly in the channels with parts sold under various Ford brands . . ." (C 286u). In contending that the judge erroneously excluded sales by wholesale distributors (WDs) to rebuilders, respondent misreads the initial decision. The judge did not exclude WD sales to rebuilders but rather found "that sales by wholesalers do not constitute a significant factor in the rebuilders supply market." (I.D. 102). The judge's conclusion is substantiated by the virtually unanimous testimony of every rebuilder witness that WD prices were so much higher than rebuilder suppliers' (20-40 percent greater) that they sought parts from WDs only in an emergency or when the parts were not otherwise available. (I.D. 96, 97). Nine industry members stated that rebuilders could not produce a rebuilt unit for less than a new one if they had to purchase all new parts from WDs. (I.D. 99).

3. *Exclusion of Occasional or Single-Line Suppliers of New Parts, Materials, and Equipment*

Respondent likewise misreads the initial decision when it contends that the judge excluded from the market suppliers that did not sell "primarily" to rebuilders. (Res. App. Br. 33-36). To the contrary, the judge included the

proven sales of other suppliers in the market but found "at best [they] were insignificant suppliers whose total dollar volume of sales would not materially alter the overall dollar value of the rebuilder supplies market . . . ." And, "complaint counsel's failure to include these 14 companies [and similar types of suppliers] does not materially alter the overall structure of the rebuilder suppliers industry as set forth in Finding 60." (I.D. 94).

Respondents' argument concerning the other suppliers, as apparently acknowledged in its reply brief (pp. 8-11), in actuality relates to the size of the market and the substantiality of the sales to rebuilders by suppliers other than those included in complaint counsel's original list of rebuilder suppliers.

C. *Sales by Rebuilder Suppliers of New Parts, Materials, and Equipment to Rebuilders Constitutes a Distinct and Valid Market*

When the air is cleared of all of respondent's protestations and references to relatively insignificant exceptions to the ordinary course of dealing in the rebuilder supply field, the conclusion that sales of new parts to rebuilders of automotive electrical units is a relevant line of commerce within classic Section 7 terms is inescapable. In 1964, all significant suppliers of new parts to rebuilders, except the OEMs, specialized in sales to a distinct class of customers, production-line rebuilders. (I.D. 61, 65, p. 39). These suppliers catered to the needs of rebuilders with salesmen specially soliciting and serving the rebuilder trade (I.D. 61), with research and development of new methods and products for the rebuilder (I.D. 61), and with specialized catalogs and price sheets for rebuilders. (I.D. 65).

In addition to the fact that the rebuilders supply industry was recognized by rebuilders as the indispensable source of new parts, the rebuilder suppliers themselves

recognized the industry as a separate economic entity. Despite respondent's assertions to the contrary (Res. App. Br. 38-39), the record amply demonstrates that rebuilder suppliers' pricing decisions were made primarily on the basis of the prices charged by the four largest rebuilder suppliers, particularly IPM. (I.D. 62, 63; CX 44a). Several rebuilder suppliers also equalized freight, which is one of the major cost factors in the industry, so that their total prices to a particular rebuilder would be similar to the prices of IPM, Ace, and Valley Forge. (I.D. 62; Tr. 656-57, 966-97, 1110-11). *See General Foods Corp.* v. *FTC*, 386 F.2d 936, 941-42 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

Our conclusion that this market meets at least five of the seven practical indicia for defining submarkets noted in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962)[28]—industry recognition, distinct customers, distinct prices, sensitivity to price changes and specialized vendors—is confirmed by Avnet's own preacquisition memoranda. (CX 36, CX 37d-f, CX 44).[29] All the memoranda, which were prepared by Mr. Fischer, the President of Avnet's Valley Forge Division and an Avnet director and vice-president, strongly indicate that Valley

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[28] The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust purposes. *United States* v. *E.I. DuPont De Nemours & Co.*, 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as *industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.* (Emphasis supplied.)

[29] Copies of Commission exhibits 36 and 44 are attached to this opinion as Appendix A and B.

Forge viewed only IPM, Ace, and Vulcan as meaningful competitors. (CX 36c, 37d, 44a-b). Moreover, Mr. Fischer concluded:

> The acquisition of IPM would serve chiefly to remove our most major competitor from the scene. This would reduce to an overwhelming extent the price competition that is a major factor in the industry. In many cases severe competition has held profit margins on key items to a reduced level owing to the ability of two firms to offer substantially the same item at the same price. (CX 44a).
>
> We have glossed over the natural inherent advantages of elimination of bitter price competition for this is taken for granted, but the benefits should not be discounted. (CX 36d).

That Mr. Fischer was not alone in his view is demonstrated by the comments of IPM's sales manager immediately after the acquisition:

> . . . we would not have to make price concessions to compete with one another in the manner we have done in the past, and thus enhancing the over-all profit of the Corporation. (CX 35c).

These observations by two of the most knowledgeable individuals in the rebuilding field indicate that the rebuilder supply market, which would be dominated after the acquisition by Avnet, was a separate and distinct market. Only if a distinct market existed would Avnet have the power to reduce to "an overwhelming extent the price competition" in the industry.

As we stated in *General Foods Corp.*, 69 F.T.C. 380, 414 (1966), *aff'd*, 386 F.2d 936, 941 (3rd Cir. 1967), *cert. denied*, 391 U.S. 919 (1968):

> It is obvious that if respondent and the other steel wool soap pad manufacturers regard themselves as

> a separate market, then it is this market in which the impact of respondent's acquisition must be judged.

III. Size of the Relevant Market

Respondent's most vigorous challenge to the initial decision is its attack on the judge's conclusions concerning the size of the rebuilder supply market. Respondent asserts that complaint counsel failed to meet its burden of proof demonstrating the approximate size of that market (Res. App. Br. 42-44; Rep. Br. 6, 11), that the judge shifted the burden of proving the market size to respondent (Res. App. Br. 43-44; Rep. Br. at 11), and that, thereafter, the judge prevented respondent from developing and introducing evidence on market size by refusing to grant certain prehearing discovery requests, excluding respondent's market surveys and excluding certain testimony regarding the amount of sales in the market. (Res. App. Br. 45-53; Rep. Br. 5-6, 9-15).

A. *Substantial Evidence Supoprts the Judge's Market-Size Determination*

At the outset, it should be noted that reliable market data for this industry is extremely difficult to obtain. Complaint counsel, to establish a prima facie case, introduced into evidence the sales figures for 17 rebuilder suppliers considered by complaint counsel to account for the overwhelming majority of the total sales in the market.[39] The estimate of market size based on the ag-

[39] The following table lists the 17 firms in complaint counsel's market with their 1964 sales to rebuilders (I.D. 60):

Company	Sales ($000)	Market Share (%)
IPM	11,353	57.4
Ace	2,200	11.1
Valley Forge	1,856	9.4

[Footnote continued on page 49a]

gregate 1964 sales of these 17 firms, which amounted to $19.8 million, was corroborated by computations based on the 1967 Census of Manufacturers. In that year, the sales of rebuilt generators, alternators, starters, and voltage regulators amounted to $67.8 million. (I.D. 108). Since, as uncontroverted testimony in the record indicates, new part purchases by rebuilders account for approximately 15-35 percent of their total sales (I.D. 109), the judge found that the new part purchases by rebuilders to rebuild these four types of units was roughly $10-$25 million in 1967. Noting that sales of rebuilt parts increased substantially between 1964 and 1967, the judge concluded that "the Census data substantially corroborates the approximate twenty (20) million dollar figure" represented by the total sales to rebuilders of the rebuilder suppliers included in complaint counsel's market. (I.D. 112).

In challenging the judge's reliance on the estimates extrapolated on the basis of the census report, respondent

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[30] [Continued]

Vulcan Motor Products	750-1,000	5.0
VMC & Rebuilders Supply Co.	1,000	5.0
Carwin Sales	511	2.6
Butts Electric Supply Co.	438	2.2
American Starter Drive Service	425	2.1
Ennis Automotive, Inc.	167	.8
Preferred Electric & Wire Corporation	100-150	.8
Lincoln Bearing Co.	138-165	.8
Starter Service Company, Inc.	128	.6
Los Angeles Commutator	122	.6
Precision Field Coil Co.	95	.5
Jamison Parts	less than 70	.4
Hubert Products	55	.3
Rich Engineering Co.	46	.2
TOTAL	19,781	100.00

In addition, we note that in 1964, Ford, Chrysler, and General Motors had sales to authorized rebuilders of $500,000, $60,000, and $50,000, respectively. (I.D. 78, 80, 81). *See* p. 7, *supra*.

argues that many production-line rebuilders may not have been included and furthermore that the judge's reliance on the census report in resolving the market-size issue effectively denied respondent's right to cross-examination.[31] While we acknowledge that the census data may not present the most precise picture of the rebuilding industry and that the further extrapolation to estimate

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[31] The cross-examination issue was previously treated by the Commission in its Ruling on Certification of Request for Subpoena to Government Official of January 29, 1971, in the present case. There we granted a subpoena ad testificandum to Paul F. Berard, Chief of the Census Bureau's Metals and Machinery Branch, to afford respondent the opportunity to cross-examine the official responsible for collecting and compiling the Census data in question "regarding the terms used in the report and the manner in which the firms furnishing the information as well as the products were classified in the report." (*Id.*, p. 2.) Mr. Berard, in fact, testified in this proceeding. (Tr. 499-524).

However, in the same opinion, the Commission denied respondent's request for a subpoena duces tecum to Mr. Berard, which would have required him to produce a list of the firms that furnished the information compiled under certain product codes. We felt that the opportunity to question Mr. Berard would adequately protect respondent's right of cross-examination. In this regard, we noted that the rule set forth in *Wirtz* v. *Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1964), which would require that underlying survey material be made available to respondent's counsel when a summary of the survey is to be introduced in evidence, is inapplicable to a regular report of the Census Bureau:

> We are of the opinion that this rule does not obtain with respect to regular reports compiled and published by Bureau of the Census pursuant to Title 13 of the United States Code. Generally speaking, the latter is admissible without production of the underlying material in an administrative proceeding under Section 7 for the reason that necessity and circumstantial guaranty of trustworthiness is present and the Commission may take official notice thereof. *Cf. United States* v. *Aluminum Co. of America*, 35 F. Supp. 820, 823-825 (S.D.N.Y. 1940); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 445, 446 (2d Cir. 1945); Dession, "The Trial of Economic and Technological Issues of Fact," 58 Yale L. J. 1019, 1242 (1949). This also appears to be the established practice before the courts and, as far as we are aware, has not been successfully challenged.

the rebuilders' purchases of new parts in 1964 provides us with only a general "ball park figure" of the size of the market, we cannot say that the judge erred in utilizing the census data to corroborate complaint counsel's other evidence on market size. What respondent ignores is that the judge in his initial decision actually relied more heavily on several other findings based on substantial evidence in the record in determining the size of the market. (I.D. pp. 41-43). Except for the census report, all pertinent testimony was subject to cross-examination by respondent.

Thus, the judge also relied on "uncontradicted testimony of almost every rebuilder . . . that in 1964 and for a number of years prior thereto, four firms, viz., IPM, Ace, Valley Forge and Vulcan, were the major suppliers of new parts, materials and equipment to rebuilders." (I.D. 68, p. 42). The judge further found, and the record amply demonstrates, that the four major suppliers furnished rebuilders with between 64-97 percent of their new parts requirements. (I.D. 69, p. 42). Large and small rebuilders alike and rebuilders from all sections of the country and in several areas of specialization all agreed that IPM, Ace, Valley Forge, and Vulcan furnished the majority of new parts (I.D. 69) and the bulk of their requirements in 1964 of new materials and equipment. (I.D. 70).[32] (See Appendix C).

Respondent, however, takes issue with the judge's holding that the evidence relied upon by the judge was

[32] Respondent does not contend that the rebuilders who testified in this proceeding were unrepresentative of the production-line rebuilders throughout the country. Although most of the rebuilders who testified tended to be larger than average, we note that substantial evidence indicates that small and medium-sized rebuilders would tend to purchase a greater percentage of their new parts requirements from the four "full-time" suppliers because of the reduced freight costs and greater convenience of purchasing several different items from a single supplier. (I.D. 76(b)(c)).

sufficient to meet complaint counsel's burden of proof under the Commission's *Papercraft* decision.[33] (Res. App. Br. at 44). In *Papercraft*, we noted that the development of precise market data could be "prohibitively expensive and burdensome to obtain" in industries characterized by a central core of firms surrounded by a fringe of much smaller competitors. Relying on the Supreme Court's statement in *Brown Shoe* that "precision of detail is less important that the accuracy of the broad picture," we held in *Papercraft* that complaint counsel had sustained their burden by establishing the sales of the major firms identified by experienced executives in the gift-wrapping industry where those executives expressed substantial agreement on the total size of the industry. While respondent is correct in asserting that one element of proof in *Papercraft*—the agreement among the executives of the major competitors as to total market size—is lacking in this case, we feel that the underlying rationale of our decision in *Papercraft* is certainly applicable here. As indicated by several appellate court decisions, the real concern of an appellate tribunal in Section 7 cases concerning industries of this type is simply that the fringe firms' aggregate market share is not so substantial as to cast doubt on what would otherwise be an illegal merger under any interpretation of Section 7. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 364 n.40 (1963); *Luria Brothers and Co.* v. *F.T.C.*, 389 F.2d 847, 858 (3rd Cir.), *cert. denied*, 393 U.S. 829 (1968). Thus, it is not necessary in all merger cases for complaint counsel to establish the overall size of the market as long as probative evidence exists from which the outer dimensions of that market can be determined.

On the present record, we find that complaint counsel has more than adequately met their burden. Complaint

[33] *In Re Papercraft Corp.*, Dkt. 8779 (June 30, 1971), pp. 9-12, *aff'd*, No. 71-1681 (7th Cir., January 25, 1973).

counsel's listing of firms in the market undoubtedly includes all full-time suppliers. In addition, we find no indication in the record that complaint counsel's listing omits any significant supplier selling a broad range of new products to rebuilders except the OEMs which we have included in the market.

The testimony of the rebuilders and of some rebuilder suppliers indicates, however, that rebuilders purchase new parts, materials, and equipment from a large number of suppliers which sell basically one product line. Often, as in the case of wire manufacturers, these sales are incidental to their overall business to the point that such suppliers make no effort to sell to the rebuilder market. In such circumstances, where complaint counsel's evidence tends to show that rebuilders generally purchased a majority of their new parts requirements from the main core of suppliers, we do not feel that complaint counsel has to undertake the onerous additional burden of demonstrating that the aggregate sales of the single-line suppliers in at least 20 different product classifications (CX 37a-c) would not materially affect the size of the market.

While respondent contends that the judge in his decision shifted the burden of proving the size of the relevant market to Avnet, it concedes that the judge, throughout the prehearing stages of the case, repeatedly informed respondent that it did not bear the burden of proving market size "but had only to demonstrate that Complaint Counsel had overlooked several categories of substantial suppliers to rebuilders." (Res. Br. 43). We find that the judge's prehearing instructions to respondent were not only correct but necessary to avoid substantial delay in the proceedings. *See* Subsection III-B, *infra*. We further find that, contrary to respondent's assertion, the judge did not shift the burden of proving market size to the respondent but that respondent, despite two years

of prehearing discovery and its expert knowledge of the industry,[34] simply failed to produce any significant number of suppliers which either had substantial sales themselves or were representative of a category of rebuilder suppliers with substantial sales in the aggregate.

Altogether, respondent called 14 alleged suppliers of new parts to rebuilders in an effort to demonstrate that complaint counsel had vastly understated the size of the market. With the exception of two firms—Belden and Phelps Dodge—respondent failed to identify any supplier with sales to rebuilders in 1964 exceeding $100,000. Nor is there any reliable evidence in the record indicating that the suppliers with sales under $100,000 were representative of a large number of small suppliers of rebuilders with substantial sales in the aggregate.

Contrary to respondent's assertions, we do not find that complaint counsel's omission of Belden and Phelps Dodge seriously undermines their estimate of market size. Rather, we conclude on the basis of IPM's own market survey (CX 39) that the two wire manufacturers, together with the suppliers listed by complaint counsel in their market, accounted for almost the total sales of wire sold to rebuilders in 1964. Magnet wire is used by rebuilders primarily in rewinding armatures by the so-called "random-winding" method. In 1964, armatures were rewound using either the "random-winding" method or the preformed coil method, which at that time required coils obtainable only from IPM or VMC, a supplier listed by complaint counsel in its original market.

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[34] Probably no two individuals are more familiar with the rebuilding industry then Avnet's two vice-presidents, Mr. Mansfield and Mr. Fischer. As one rebuilder testified:

> I think it is generally acknowledged [that Mr. Mansfield] has done more for the electrical rebuilding industry than any other man in the country. (Tr. 898).

Both men had been involved in the industry for more than a quarter century. (Tr. 890, 1568).

In the IPM market survey, Mr. Mansfield estimated that 5 million rewound armatures were produced in 1964 of which IPM accounted for 2.55 million, 1.3 million by preformed coils and approximately 1.25 million through its sales of magnet wire. (CX 39). In addition, VMC supplied approximately 400,000 preformed coils in 1964. (Tr. 1245, 1252-54). Whether we rely on Mr. Mansfield's estimate of 5 million rewound armatures produced in 1964 or on IPM's advertising claim that the majority of armatures were produced by preformed coils (CX 234, page CIG-2),[35] it is apparent that suppliers other than IPM and VMC provided the windings for between .5-2 million armatures in 1964. Placing the cost of each winding at approximately $1.00 per armature (Tr. 1253), it becomes clear that the wire suppliers called by Avnet accounted for most of the remaining sales of winding materials to rewinders in 1964.

In view of the unquestioned experience and expertise of IPM and Valley Forge in the rebuilders supply industry, we can only conclude that respondent, in attempting to destroy complaint counsel's market, strongly confirmed its validity.

B. *Procedural Rulings*

Respondent spends nine pages of its appeal brief (Res. App. Br. pp. 45-53) and several pages of its reply brief (Rep. Br. pp. 4-6, 11-15) arguing that the judge prevented respondent from developing and introducing evidence on the size of the market by (1) refusing to grant certain prehearing discovery requests, (2) excluding respondent's market survey, and (3) excluding certain testimony from respondent's witnesses regarding the amount of sales in the market.

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[35] VMC's vice-president also testified that in 1964 the majority of armatures were rewound by the preformed coil method. (Tr. 1245).

As respondent admits, the judge in the prehearing stages of the case "repeatedly asserted that Respondent did not have to prove the size of a market larger than that alleged in the Amended Complaint but only had to demonstrate that Complaint Counsel had overlooked several categories of substantial suppliers to rebuilders. (*See e.g.*, Tr. 231-32, 244, 249-50, 257, 315-16, 333-34, 344-45, 352-54, 356-57)." In light of these repeated statements to respondent, the prehearing discovery requests which are in issue here can only be explained as either an attempt to establish the size of the market, which was complaint counsel's, not respondent's burden, or as a procedural tactic to unduly prolong the pretrial discovery. Respondent proposed a discovery program to subpoena the customer lists of respondent's competitors identified by complaint counsel as being in their market. (Tr. 162). Respondent proposed to send questionnaires to firms on its competitors' customer lists to determine their suppliers. Recognizing that such subpoenas to respondent's competitors were likely to be resisted by those companies subpoenaed, the judge directed respondent to first conduct questionnaire surveys of its own customers to determine their suppliers. (Tr. 168-69). In this case we feel that the judge's alternative was much more reasonable than that proposed by respondent since, as the record now clearly indicates and as the judge suspected, Avnet's customer list *is* the rebuilding industry.

The judge's ruling was entirely consistent with the Seventh Circuit's recent holding in *Papercraft Corp.* v. *FTC*, No. 71-1681 (January 25, 1973), that the Commission could require respondents to demonstrate the need for exceptional discovery requests. Here, Avnet's requests were exceptional, not because of the number of subpoenas as in *Papercraft*, but because of the confidential nature of the material requested (see Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f)) and the high probability that Avnet's competi-

tors would strongly resist disclosure of their customer lists. Since it is difficult to imagine that a thorough survey of Avnet's own customers would fail to reveal the names of any substantial rebuilder suppliers in the country, we find that Avnet has not demonstrated the necessity for the subpoenas to its competitors.

Although it could be concluded that the requirements of due process were met when the judge permitted respondent nine months to conduct a survey of its customers to determine their suppliers, the judge offered to permit respondent further discovery if respondent's survey showed that substantial competitors existed who were not listed in complaint counsel's market. (Tr. 362-64, 414). The responses to respondent's questionnaire to its own customers, however, failed to produce more than a mere handful of firms in the relevant market. Respondent contends throughout its brief and argument before the Commission that the survey identified 1,001 new parts suppliers to rebuilders. Curiously, that survey was never introduced into evidence. Since respondent was given ample opportunity to subpoena any rebuilder or competitor to testify in this proceeding (Tr. 2398) and, as evident from our previous analysis of the record evidence, totally failed to produce more than two competitors with 1964 sales to rebuilders in excess of $100,000, we can only conclude that the judge was entirely correct in his evaluation of respondent's questionnaire technique.

Furthermore, we note that respondent voluntarily entered into a stipulation in October 1970 in which it agreed to commence the trial on January 25, 1971. (Tr. 429). The parties also agreed that a reasonable period of two to three weeks, later expanded to three months, would be allowed between the conclusion of the case-in-chief and the beginning of respondent's case to allow additional discovery by respondent. (Tr. 430).

Respondent's second challenge to the procedural rulings of the judge concerns his refusal to permit respondent to add a survey to its list of exhibits after respondent's defense was two-thirds completed.[36] Respondent contends that the survey was necessary to determine the total volume of sales in 1967 of rebuilt automotive electrical units. (Res. App. Br. 46-49; Rep. Br. 11-15). This again, under the judge's statement of respondent's burden on the market-size issue, was totally unnecessary. Respondent asserts, however, that the survey was essential to demonstrate the incompleteness of the data contained in the 1967 Census Bureau's report which complaint counsel introduced to corroborate their evidence on the market-size issue.

The six-month period between the time that complaint counsel informed respondent they would rely on the 1967 census data and the date on which respondent actually contracted for the survey alone refutes respondent's contention.[37] Moreover, respondent informed neither the judge nor complaint counsel of the fact that it was conducting the survey even though most of the survey was conducted during the time that respondent was putting on its case.[38] Such action by counsel before any tribunal

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[36] Order Denying Respondent's Request to Amend Its Exhibit List, July 23, 1971.

[37] Respondent was informed of complaint counsel's intention to introduce census data on October 30, 1970 (Tr. 430), but respondent did not contract for the survey until April 19, 1971. (Res. App. Br. at 46).

[38] While respondent asserts that Mr. Maloney (the witness through whom the survey was to be introduced) was included in its list of witnesses, the judge's findings, based in large part on correspondence between counsel for respondent and complaint counsel, indicate respondent's efforts to avoid revealing the nature of Mr. Maloney's testimony:

> Complaint counsel assert that their attempts to talk with Mr. J. M. Maloney, the witness through whom this exhibit is to be introduced, have been continually thwarted. Complaint

is highly suspect; it is contrary to all pretrial procedures.[39]

Respondent's protestations aside, the survey is largely irrelevant to any issue in this case. Respondent surveyed repair shops, service stations, car dealers and fleets, all of which are clearly distinct from rebuilders and are outside of the relevant market. Moreover, most of the information requested in the survey related to the number of cost of units rebuilt by the repair shops surveyed. (Res. App. Br. at 47 n.55). Since the total sales of repair shops and custom rebuilders was never an issue in this case, respondent's time and money would have been better spent in attempting to find a few representative repair shops that competed with production-line rebuilders rather than conducting the survey.

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counsel also state that when they interviewed Mr. Maloney in April 1971, he told them he had no idea of the substance of his proposed testimony and when they contacted Mr. Maloney again later that month he advised them he had been advised *not* to talk to complaint counsel about his testimony without respondent's counsel being present. Complaint counsel further state that they attempted to arrange with respondent's counsel to interview Mr. Maloney prior to the resumption of the hearings in May 1971 (see Appendix 1), but were informed that they would not be permitted to interview Mr. Maloney prior to the resumption of the hearings and that it was possible that Mr. Maloney would not even be called to testify (see Appendix 2).

Even more serious is the fact that respondent's counsel deliberately refused to divulge the purpose of Mr. Maloney's testimony when in fact at the very time complaint counsel was seeking to interview Mr. Maloney, the survey had already been commissioned and questionnaires thereunder were being mailed out in April 1971.

Order Denying Respondent's Request To Amend Its Exhibit List, July 23, 1971, pp. 3-4.

[39] A review of the record reveals a series of instances where respondent ignored the judge's orders and rulings. (Tr. 2236-39, 2385-98, 3955-60, 3983-91, 4000-03, 4080-91).

In the course of its defense, respondent attempted to show through the testimony by its own officials, Mr. Mansfield, Mr. Eigenberg, and Mr. Fischer, that a substantial portion of the sales of IPM and Valley Forge in 1964 were to service stations and repair shops. With respect to IPM, respondent introduced the results of a survey conducted by its own salesmen in the three-month interval between the end of complaint counsel's case and the beginning of respondent's defense. The survey revealed that 166 of IPM's 1971 accounts had service facilities. After acknowledging that only 49 of these 166 customers had purchased from IPM in 1964 and that their total purchases amounted to less than $45,000 (CX 290), respondent, through its vice-president, Mr. Mansfield, attempted to expand the list of service station customers to 700 or more. (Tr. 2141-51). Since Mr. Mansfield's attempt to expand the list of service station customers on direct examination was unsupported by any concrete factual data, the president of Avnet, Mr. Sheib, directed him to conduct another survey of IPM's salesmen during the weekend between his direct and cross-examination. As Mr. Mansfield admitted on cross-examination:

> When I left this Hearing Room the Hearing Examiner was very disturbed about the material that was there [the first survey]. I was told in no uncertain terms by Mr. Simon Sheib that I had better firm up this information and do something about it. (Tr. 2146).

We agree wholeheartedly with the judge's exclusion of the testimony of both Mr. Mansfield and Mr. Eigenberg concerning this survey since the survey was developed during the course of the hearings. (Tr. 2268, 3311-13A). Such a survey could easily have been conducted by respondent at any time during the two years of pretrial in this matter or even in the three-months' recess between the end of complaint counsel's case and the beginning of respondent's defense.

Not dissuaded by the judge's rulings excluding the "weekend survey" conducted by Mr. Mansfield, respondent, through Mr. Fischer, attempted to establish Valley Forge's 1964 sales by product categories and types of customers from figures contained in a ledger book which had been maintained continuously since 1959. (Tr. 3975-4003). Respondent did this despite the fact that the Commission counsel, during the course of the investigation four years previously, had requested respondent to report information for Valley Forge, IPM, and other Avnet subsidiaries to "[s]how dollar value of sales for each product or product line by each class of customer." (CX 33d, ¶ 2d). In reply, respondent's counsel indicated that Avnet could not provide such data because "it has only incomplete records of sales by product line and therefore could not supply the information requested . . . without making an individual tabulation of invoices which will require great many man months of labor." (HE 3a). While respondent in its reply brief (Rep. Br. at n.11) attempts to rebut the inescapable conclusion that it knowingly withheld information from the Commission by asserting that the development of the sales figures by IPM and Valley Forge required a considerable expenditure of time and effort, the acknowledged existence of the ledger breaking down Valley Forge's sales by product line and class of customer [40] disputes respondent's contentions.

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[40] As Mr. Fischer testified (Tr. 3978):

Q Were the figures broken down between sales of ignition parts and sales of rebuilder parts?

A Well, all of the items were divided, as I stated, I believe it was about 61 or 62 categories at that time, and we took those items that sold only to the ignition market to be an ignition item. We had some items that sold all or practically all in the rebuilder market. Then, of course, there were some items that crossed over where there was a common market factor for both markets.

Q What did you do to ascertain the sales of those overlapping items that should go in the rebuilder sales as opposed to ignition sales?

[Footnote continued on page 62a]

Accordingly, respondent followed a course of conduct throughout four years of investigation, prehearing discovery, and trial during which it (1) denied the existence of a ledger book that had been known to the top officials of Avnet for eight years, (2) never disclosed the existence of such sales figures throughout two years of prehearing discovery, (3) never listed the book in its list of proposed exhibits or as the basis of Mr. Fischer's testimony, and (4) never disclosed the existence of the ledger to complaint counsel or the judge prior to Mr. Fischer's testimony.

Again, respondent, through Mr. Fischer, attempted to introduce the results of a survey conducted weeks after the beginning of respondent's defense which had not been noticed to complaint counsel. (Tr. 4085-92). Like Mr. Mansfield's survey, this was an attempt to show that Valley Forge in 1971 had substantial sales to repair shops. Our comments with respect to Mr. Mansfield's survey apply equally here, particularly in light of the fact that the testimony on the survey of Valley Forge's customers followed the events that we have summarized above.[41]

Finally, respondent objects to the exclusion of the testimony of Mr. Roberts, a wholesale distributor, on his sales to rebuilders in 1964. (Res. App. Br. 51-52). The

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[40] [Continued]

A Well, first of all, items that definitely were one or the other were no questions. In some cases we took what we regarded as the overwhelming usage. In other words, if it was 90 percent or 95 percent rebuilding in our judgment, then we would have called it a rebuilder part. Wherever we could exclude and separate, we did so because it was of importance to us to recognize the paths that these product lines were going.

[41] We might also note, to give the reader a complete picture of the setting in which the judge made the procedural rulings to which respondent objects, that the day that Mr. Fischer testified was the first time that respondent revealed the fact that the survey of repair shops discussed at pp. 34-36, *supra*, had been conducted. (Tr. 4002).

judge so ruled because the witness lacked knowledge about his customers' businesses and the use they made of the new parts which they purchased. This is evident from the fact that three of Roberts' alleged "rebuilder" customers who testified in this proceeding were actually repair shops. (Tr. 2164, 2169, 2549, 2749; I.D. 40).

IV. Anticompetitive Effects

In his initial decision, the judge found that Avnet's acquisition of IPM, resulting in a firm with approximately two-thirds of the relevant market, had severe anticompetitive effects, not only by eliminating Avnet's largest competitor from the market, but by substantially increasing the previously high levels of concentration in the industry and entrenching Avnet as the dominant firm in an industry where barriers to entry were already formidable. (I.D. pp. 43-44). In reaching these conclusions, the judge relied heavily on two memoranda prepared by Mr. Fischer, an Avnet director and vice-president as well as the President of Avnet's Valley Forge division. (Tr. 888, 3962-64).

Throughout this proceeding, respondent has argued that the two memoranda (CX 36 and CX 44, attached as Appendix A and B), which are extensive discussions of the competitive situation in the rebuilder supply industry and the benefits of Avnet's planned acquisition of IPM, were prepared by Mr. Fischer without any direction from any officer of Avnet and were never shown to any other person prior to 1967. (Res. App. Br. at 55; Rep. Br. at 15). However, the basic issue here is one of credibility which is a matter peculiarly within the domain of the trier of fact who is in a much better position than we to judge the demeanor of the witness, namely Mr. Fischer. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951). After closely examining Mr. Fischer's testimony, we feel compelled to affirm the judge's conclusion that the

Board of Directors and other top management officials of Avnet were fully aware of the thoughts expressed in these two memoranda even though they may not have actually read them.

Thus, the judge found on the basis of ample evidence on the record that the memoranda were prepared before the Avnet Board meeting of February 15, 1965, which was held for the purpose of discussing the proposed acquisition of IPM. Mr. Fischer, then a member of the Board of Directors, attended the meeting and comprehensively briefed the members of the Board on the rebuilder supply industry and IPM in particular. (Tr. 4150, 4154, 4221, 4229-30; CX 285b). Mr. Fischer admitted on cross-examination that the thoughts expressed in these two memoranda were clearly in his mind at the time he attended the Board meeting. (Tr. 4222-23). Furthermore, Mr. Fischer testified that he discussed the nature of the rebuilder industry and the implications of the proposed acquisition with Mr. Scheib, a member of the Board and the acquisition committee, and provided him with a list of comprehensive suppliers (CX 37a-f) before the Board meeting. The evidence also shows that Mr. Scheib made a presentation to the Board of Directors at that Board meeting on various aspects of the proposed merger including competitive conditions in the industry. (Tr. 4155, 4221-22, 4229).

Confronted with the overwhelming evidence that the top management of Avnet was fully aware of the content of these memoranda, respondent argues that the judge in his initial decision placed undue reliance on the predictions contained in the memoranda in light of overwhelming evidence on the record demonstrating their inaccuracy. (Res. App. Br. at 55). However, as the judge found, there is substantial evidence in the record to demonstrate how accurate Mr. Fischer's predictions were. Mr. Fischer observed, for example:

> The acquisition of IPM would serve chiefly to remove our most major competitor from the scene. This would reduce to an overwhelming extent the price competition that is a major factor in the industry. In many cases severe competition has held profit margins on key items to a reduced level owing to the ability of two firms to offer substantially the same item at the same price. (CX 44a). (Appendix B).
>
> We have glossed over the natural inherent advantages of elimination of bitter price competition for this is taken for granted but the benefits should not be discounted. (CX 36d). (Appendix A).

Two months after Avnet's acquisition of IPM, Jim Paschal, IPM's sales manager, noted in a memorandum to Mr. Mansfield the benefits of a division of markets between IPM and Avnet to reduce price competition:

> Having become a part of the Avnet Corp. it is reasonable to believe that International Products & Mfg. Co. will be able to show where it would be extremely profitable for Valley Forge to concentrate on the redistribution outlet for their products, and International Products & Mfg. Co. to concentrate on the rebuilding industry for their outlet.
>
> This way, we would not have to make price concessions to compete with one another in the manner we have done in the past, and thus enhancing the over-all profit of the Corporation. (CX 35c).

In addition, as Mr. Fischer had predicted (CX 44a), both IPM and Valley Forge discontinued discounts to large customers. (I.D. 126).

Mr. Fischer also envisioned a division of markets between IPM and Valley Forge with the former concentrating on the rebuilders supply field, where it was undoubtedly the dominant firm, and the latter emphasizing the sales of ignition parts, a product line not sold to rebuilders:

> If we were able to point to the future where one division would pursue the rebuilding industry and the other to be free to make progress in ignition products and perhaps other items for the consumer product market it could be realized that the freed creative time could be put to great advantage for purposes of expanded sales. (CX 36b). (Appendix A).

Again Mr. Fischer's projections were amazingly accurate. The record shows that between 1964 and 1969 Valley Forge's sales of ignition parts increased more than tenfold from $184,000 to $2.185 million while its sales of rebuilder parts increased only slightly from between $1.5 million and $1.856 million in 1964 to $1.871 million in 1969 despite a rapid growth in the rebuilding industry. (Tr. 3976, 4006, 4166, 4232-33). *See also* CX 35c, quoted p. 41, *supra*.

Finally, in an extensive discussion of the barriers to entry in the rebuilder supply market, Mr. Fischer noted in his 1964 memoranda:

> By combining Valley Forge and IPM it is very unlikely that any other company could arise to become a substantial competitive factor. The amount of tooling required on older numbers with reduced sales would preclude anybody making the investment which would be very unsound. It is always possible that original equipment manufacturers would choose to enter the field with tremendous sums available for the job to be done but in light of experience, it is not likely that they would embark on a program of tooling where the items to be made were hardly likely to show amortization of the investment. In order to become a factor any newcomer would have to

> make a very substantial investment in order to give sufficient coverage. To start from scratch and become a factor we estimate the minimum figure of three to four million dollars which would not afford full product coverage. In addition we estimate that this project would involve several years in which time new items would undoubtedly be introduced that would make the problem more complex and expensive. In short it would be reasonable to conclude that the acquisition of IPM would place us in a dominant position and probably beyond reach of any newcomer. (CX 44a). (Appendix B).

Mr. Fischer's estimate of the investment necessary to offer broad product coverage is confirmed by the witness from Vulcan who testified that a 1964 study indicated that a $750,000-$1,000,000 investment would be necessary for Vulcan to enter the alternator parts business. (Tr. 992). He estimated that an investment of approximately two-and-a-half million dollars would be necessary to tool up to manufacture starter, generator, and alternator parts. (Tr. 994). Mr. Fischer's assessment of the barriers to entry in the rebuilder supply field is further supported by the fact that no firm offering any substantial breadth of product coverage entered the field between the time of the acquisition and the time of this proceeding.[42] (Tr. 4171-73).

Finally, respondent argues that in utilizing the memoranda prepared by Mr. Fischer, the judge in his initial decision ignored the first page of the one memorandum noting the tremendous influence of the OEMs in the aftermarket and the fact that the entire rebuilding industry and its suppliers are allied in a battle against the OEMs. (CX 36a). As we stated at the outset, we acknowledge the dominance of the OEMs in the auto-

[42] *See also* pp. 10-15, *supra*.

motive aftermarket, a dominance due largely to the fact that the majority of consumers, being inadequately informed of the price, quality, and availability of rebuilt parts, have been persuaded to accept the higher-priced new parts offered by the OEMs. While the rebuilding industry is not yet a sufficiently large threat to the OEMs' business to make it necessary for the latter to lower their prices to meet the rebuilt prices—a situation that would prevail only if the two were in fact part of the same market—the rebuilders do offer a challenge to the OEMs in a particular segment of total aftermarket, one that offers the informed consumer more meaningful price competition and a wider range of automotive electrical units. Rebuilders serve a market characterized by relatively knowledgeable and cost-conscious consumers. OEMs serve a separate market, one characterized by relatively less knowledgeable and less cost-conscious consumers. The barrier between them, inadequate information on the part of the motorists, protects the higher price level of the OEMs from erosion by the rebuilders. Lessening competition within the rebuilder supply industry, and thus raising the rebuilders' price level closer to that of the OEMs, is hardly the way to increase the likelihood that the potential for competition between them will some day become an effective reality.

Despite both subtle and ruthless attempts by the OEMs to impair the ability of rebuilders to compete since the inception of the rebuilding industry, the industry has prospered dramatically. We find nothing in the record which demonstrates that the continued prosperity or future growth of the industry is now suddenly dependent on a concentration of economic power among rebuilder suppliers to protect the industry from the OEMs. In fact, the evidence on this record demonstrates that exactly the opposite is true.

In summary, the record amply demonstrates that Avnet's acquisition of IPM gave it an impregnable position atop the concentrated rebuilder supply industry with approximately 60 percent of the market, six-times greater than that of its largest competitor. On this basis alone, the acquisition could be deemed violative of Section 7 of the Clayton Act. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 364-65(1963); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 343 (1962). When, in addition, there is ample evidence to indicate that Avnet acquired IPM to diminish price competition, divide markets, and increase the already formidable barriers to entry in the industry, we are compelled to affirm the judge's decision that the acquisition is illegal.

V. Scope of the Order

Respondent attacks the judge's order in three respects. (Res. App. Br. 55-62; Rep. Br. 21-23). First, respondent contends that it should be able to divest Valley Forge instead of IPM. In light of the ample evidence on the record indicating that Avnet acquired IPM to establish itself as the paramount rebuilder supplier and sought to decrease the previous price competition between IPM and Valley Forge by diminishing Valley Forge's role in the rebuilder supply field, we can only conclude that to permit the divestiture of Valley Forge rather than IPM would be to run the risk that Avnet was at least partially successful in carrying out its plan. Certainly, when a respondent enters into a clearly illegal arrangement, it, rather than the public, should suffer the consequences of its own attempt to stifle competition.

Second, respondent argues that the ban on future acquisitions without prior Commission approval unjustifiably extends to a broader line of commerce than that found to be the relevant market for purposes of judging the legality of the acquisition. Paragraph 3 of the judge's

order prohibits Avnet from acquiring any firm "engaged in the business of manufacturing and/or supplying parts, materials, equipment and other products to automotive electrical unit rebuilders" for ten years. The order provision thus bans acquisitions of firms selling rebuilt or used as well as new parts to rebuilders. In view of Avnet's position as an important manufacturer and marketer of automotive replacement parts, its acquisition of more than 20 companies in the past decade, its position as one of the major suppliers of new parts to rebuilders, and its relations with rebuilders developed over eight years of ownership of two of the major rebuilder suppliers, we consider respondent to be not only a potential, but a likely, entrant into any segment of the rebuilder supply business open to it. (I.D. 2, 3, p. 46). *See In re Bendix Corp.*, Dkt. 8739, June 18, 1970, p. 43, *vacated on other grounds*, 450 F.2d 534 (6th Cir. 1971). Moreover, respondent's actions in acquiring two of the three largest rebuilder suppliers in a six-month period evidence not only a fervent interest in gaining a strong position in the rebuilder supply field but also a complete disregard for any laws that would prohibit respondent from doing so. Consequently, the requirement that respondent come to the Commission before entering any segment of the rebuilder supply field by acquisition is necessary to insure against future violations which are similar in nature to that involved in this case.

Third, respondent objects to Paragraph 4 of the order requiring it to file annual reports of all future acquisitions. We might normally limit the annual reporting requirement to a report on those mergers or acquisitions which involve product markets related to the ban. *Cf.* Paragraph IV of the Order in *Stanley Works*, Dkt. 8760, May 17, 1971, *aff'd*, —— F.2d —— (2d Cir. 1972). Respondent's disregard for the Commission's investigative authority as well as its lack of cooperation throughout the investigation, pretrial and trial of this case, how-

ever, convince us that the usual presumption that respondent will provide a full voluntary disclosure of all acquisitions related to the ban is inapplicable here. Therefore, we feel that the slight additional burden that might be imposed by requiring respondent to discuss all acquisitions in its annual compliance report is totally justified by the need for the Commission to have timely notice of any acquisition which may impair the competitive viability of the rebuilder supply industry. We do feel, however, that the reporting requirement should be limited to ten years, conterminous with the ban on acquisitions, and have so modified the order.

Finally, complaint counsel on appeal urge that respondent be precluded from making any acquisition before divestiture has been accomplished. Since we feel that the threat of a civil penalty action if divestiture is not soon effectuated is a sufficient deterrent, we do not deem the order provision urged by complaint counsel to be necessary in this case.

February 16, 1973

APPENDIX A

APPRAISAL OF THE IPM ACQUISITION:

In this memo I have prepared a gathering of thoughts and solutions rather than a series of arguments pro and con. In every case where arguments would be against the move, it is to be recognized that no argument or problem is without solution or counter-move. In a like vein every reasonable contingency has been raised in an industry known to be dynamic and subject to changes in distribution policies.

It is critical in an appraisal to recognize and evaluate the fact that all replacement manufacturers are allied against the original equipment manufacturers or car manufacturers themselves. The list prices from which all discounts are derived and from which all computations are made are set by OEM such as United Delco of General Motors, Autolite of Ford Motor Company, etc. Historically all replacement manufacturers have existed and prospered because of the fact that they were able to offer certain advantages which were price, broader product coverage, greater flexibility and service. No reliable figures have ever been developed which would indicate with authority what percentage of the overall business was secured by OEM as opposed to replacement.

OEM has always pursued a course of action designed to get all the business they could and their efforts often touch on infringement of anti-trust laws but the practical difficulties of getting people to testify and to secure in writing what is only said verbally has prevented any serious action to deter their aggressive moves. It could be stated with complete truth that the actions currently being taken by OEM represent their highest point in terms of spending and concentration of effort to overwhelm the industry.

OEM has certain basic problems regardless of their approach and the main problem is one of distribution—

giving profit to all the levels of distribution and still ending up with a product priced at list level that will be within range. It also must be recognized that consolidated balance sheets prevent anybody from knowing if these programs have been profitable and OEM is not noted for staying with any program for a long time if it means losses. Their systems of divisional management call for profits in addition to which they undoubtedly must have some sensitivity about their dominant position in a major industry. It is to be seriously doubted that they would undertake a program of selling at a loss to drive replacement manufacturers out of business for this would assuredly result in legal action to say nothing of the FTC counter-moves.

The above has been written not as a scare but merely to serve as background for some of the other points which clearly point the way to a combining of IPM and VF which would be the most effective counter-weapon to OEM plans. The latest price sheets of United Delco of GM indicate that they have raised their individual parts prices while at the same time keeping the same price level on the total unit itself. Sticking strictly to the rebuilding field this means that the individual parts in a starter, for example, have been raised but the price of a rebuilt starter has remained at the same level. United Delco has been in the rebuilding business themselves for many years but their efforts have been stronger in the very recent past. Thus, it would follow that the independent rebuilder would be caught in an inexorable squeeze if he had to buy parts at higher prices to compete with a unit that is being sold at the same price. If the rebuilder were at the sole mercy of United Delco (not the only offender but certainly the strongest force and therefore regarded as the main threat) without recourse to the parts manufactured by the independent manufacturer and sold at price levels well below OEM prices.

By the acquisition of IPM, we would move forward in many directions. The biggest benefit would unquestionably be the removal of the competition that has existed and of the massive duplication of effort that has taken place. It is assumed that an acquisition would mean that VF and IPM could for all practical purposes cease the duplication of tools and equipment and produce for all of the industry from one set of tools. Not only would this represent a reduction in expenditure but it would also mean that longer runs for combined usage would also result in lower unit costs for both.

Insofar as purchases of outside components and parts would be concerned, the combined purchasing power would be awesome in terms of our industry and it must be admitted that only lower costs would result. It should also be realized that in certain areas, such as screw machine products and cold heading for example, our individual requirements might not justify in-plant manufacture but combined usage would clearly point the way to more vertical manufacture with the consequent savings in such a program.

One of the major points to be considered is the duplication in executive effort with major amounts of time being devoted on both sides to sales programs and products designed to gain a competitive edge. If we were able to point to the future where one division would pursue the rebuilding industry and the other to be free to make progress in ignition products and perhaps other items for the consumer product market it could be realized that the freed creative time could be put to great advantage for purposes of expanded sales.

Recognize that both VF and IPM have toolrooms where the same tools, dies and jigs are being made and then visualize freeing tooling time from one division to make products designed to penetrate another field. Both companies face the same problem of being unable to hire

sufficient toolroom personnel to make every product that it would like.

Not to be overlooked for it is a key point is the immense duplication of time and money for the creation of catelogs and this is a major cost factor for both companies. Both companies have full-time personnel creating identical catalogs in terms of content and intent, differing in presentation and method but aimed at the same end.

One of the major areas of savings would be in the cost of sales. Both companies employ manufacturers representatives working on a commission basis. It must be recognized that eventually this could be eliminated and we could substitute paid factory representatives on a salary basis with regional overseers to direct and supervise the sales efforts.

As a conclusion to the above comments, the freeing of duplicated effort would afford one company the vital time and energy to pursue other fields where there has been no penetration because of duplicated effort. Thus, if IPM would assume the major burden in the rebuilding field and VF in the other fields, we would develop a major expansion into areas where neither of us penetrate right now. We could make foreign parts which neither do at present because of the thought that the market will not permit two sets of tools and thus the business goes to Lucas, Fiat, etc. because it is not feasible for one to do so for fear that the tooling costs might not be amortized. To follow this thought one company could penetrate sacrosanct OEM parts such as heavy duty trucks, marine, etc. where OEM has kept their prices high because of the absence of competition.

It is our feeling that each company would assume the responsibility for which each would be best suited and

the facilities freed by such an action could be employed for markets now denied because of practical limitations.

The possibility of competition at this point and what could be developed is a key point. Should we acquire IPM, we would have reached an impregnable point provided we took appropriate steps to maintain our position. At this point only Ace Electric and Vulcan Motor Products would remain as replacement suppliers of any consequence. Ace was acquired in the very recent past by another company but Ace manufactures only field coils and buys the preponderant majority of their other parts from both IPM and VF. They could be more properly termed service suppliers and do not at this point have the personnel, knowledge or ability to implement a major threat in the parts they presently buy. Vulcan is years behind in product expansion and while they undoubtedly are adequately financed for such a venture, they have acquired a reputation for poor quality that will be hard to live down. In addition, the management of Vulcan is not young and it is doubtful if they would have the desire to embark on such a program at this point. They are very anxious to sell but their manufacturing facilities are reputed to be obsolete for any serious purposes of expansion. Bear in mind also that Ace Electric is right now furnishing IPM with their field coils with an estimated annual sales volume of perhaps 300,000-350,000 which would normally gravitate to VF who is a basic manufacturer of this series of items.

Feeling that the eventual plan would call for a consolidation of effort in the rebuilding field, it is our belief that we would occupy a position of such dominance that effective competition would be difficult. Should the efforts be joined it should be considered as a possibility to establish warehouses in various parts of the country to serve the local rebuilder markets. At the present time both companies have made tentative efforts but they have

been abandoned because of duplicated costs and the competitive pressures. Should IPM have installed an effective warehouse in California, for example, VF would have had to duplicate their efforts in order to protect the market. Neither has ever made a serious effort in that direction, therefore, feeling that any advantage would be temporary and the ultimate would be higher costs for both companies.

In the Canadian market, the combination would be dominant and the combined sales feature would permit the installation of purchasing in Canada for the combined sales would be enough to merit this.

In certain foreign markets, IPM has products that could be sold but because of the fact that their line has limited export appeal in many countries, the business is going to OEM overseas distribution. It does not pay an importer to send IPM a separate order for a small amount of products and incur the import charges that would result so that they buy OEM which would be cheaper to them in such cases. Were the product lines combined, the sales would of course be larger.

We have glossed over the natural inherent advantages of elimination of bitter price competition for this is taken for granted but the benefits should not be discounted.

VF also feels that such a move would enable them to concentrate their product improvement and cost picture for it would tend to concentrate their efforts and eliminate the necessity of scattering efforts.

On the minus side is to be considered the expressed desire of IPM's key officer to retire from active participation in two years more or less. It would require a concentrated effort to bridge the gap that would be left but it is felt with confidence that this could be accomplished.

It should also be suggested that IPM is financially interested in several outside but concurrent ventures in the rebuilding field with particular reference to equipment. IPM holds an unknown interest in Possis Machine in Minneapolis and steps should be taken to prevent any future competition in the equipment field from this direction.

IPM also has an arrangement with Rea Magnet Wire of Fort Wayne which could prove to be of financial benefit in VF purchases of magnet wire. There is also an interest in a carbon brush company and this is brought forth to ensure that no competitive efforts should stem from these directions.

Although no reasonable figures can be developed off the cuff it is felt that duplications of effort, tooling, time, etc. plus reduced sales costs and the gradual evolution of special price situations being phased out should result in a remarkable improvement in the profit picture.

To return to the first phase mentioned of OEM pressures, a combined front is a powerful stabilizing force. Bear in mind that if need be, IPM-VF could always do their own rebuilding at price levels that could prove to be interesting. At present both companies hesitate to even consider such a project for it would back-fire—selling your customer and competing with him would not be the shortest way to success but a combined effort would always be a perfect method of sweeping away these considerations should it be necessary.

APPENDIX B

* * (Letterhead) * *

Comparative evaluation re International Products:

In the event that Avnet does not choose to pursue the acquisition of IPM it is to be understood that alternative measures are available for attaining the same product coverage and potential sales range. Listed below are estimates of the initial costs and inventory requirements that would be needed for each of the product categories in which Valley Forge is not now active as well as the recommendations for each. Prior to this listing we should desire to make clear the following facts consistent with our knowledge of the industry.

1) The acquisition of IPM would serve chiefly to remove our most major competitor from the scene. This would reduce to an overwhelming extent the price competition that is a major factor in the industry. In many cases severe competition has held profit margins on key items to a reduced level owing to the ability of two firms to offer substantially the same item at the same price. IPM has been very active in offering preferential discounts to large customers which Valley Forge has been obliged to meet. It is recognized by both Valley Forge and IPM that we must retain a reasonable share of the business from the larger users for they represent the primary target of any substantial tooling. We both recognize that large customers are necessary for our continued growth. This has produced a situation where the large customer has used his position to play off one against the other. In this situation Maremont has been the chief offender and has used their purchasing power in the most effective manner.

2) By combining Valley Forge and IPM it is very unlikely that any other company could arise to be-

come a substantial competitive factor. The amount of tooling required on older numbers with reduced sales would preclude anybody making the investment which would be very unsound. It is always possible that original equipment manufacturers would choose to enter the field with tremendous sums available for the job to be done but in light of experience, it is not likely that they would embark on a program of tooling where the items to be made were hardly likely to show amortization of the investment. In order to become a factor any newcomer would have to make a very substantial investment in order to give sufficient coverage. To start from scratch and become a factor we estimate the minimum figure of three to four million dollars which would not afford full product coverage. In addition we estimate that this project would involve several years in which time new items would undoubtedly be introduced that would make the problem more complex and expensive. In short it would be reasonable to conclude that the acquisition of IPM would place us in a dominant position and probably beyond reach of any newcomer.

3) Marginal suppliers of a portion of the line would continue to exist but it is reasonable to conclude that they could not progress to a point of being real competition. The only other supplier of strong coverage is Ace Electric Company who manufactures only field coils and purchases the balance of the items from Valley Forge and IPM. The Ace operation has been weakened by the emergence of Valley Forge as a key supplier and manufacturer of their main item—field coils. Vulcan Motor Products of Newark, N.J. also manufactures many items but their progress has been stunted over the past few years and they have been severely outclassed. Their management is not young and by themselves, it is a

remote possibility that they would represent a competitive factor. If they were acquired by a larger company with money available for expansion, it is always possible that they could be revitalized but their present tooling is inadequate and they have acquired a reputation for poor quality which would remain with them. In addition many items are slowing up in sales and to tool them today would be poor policy and thus, a newcomer would have to start with a short line unless they were prepared to spend money merely to achieve broad product coverage without any reasonable expectation of return.

4) A reasonable by-product of merger would be the ability of a combined operation to tool any new item without fear of being unable to have reasonable amortization. To have a guaranteed market for any new item without consideration of severe price competition would provide a major assurance in the case of any substantial tooling investment. As it exists today the introduction of a new item with major tooling expense represents a calculated risk to the result of who would be first on the market to capture the first and most profitable round of sales. Eventually both companies would recoup their investment but the limitation of original equipment as the only avenue of major competition would lead to faster tooling and greater profits at the expense of the OEM suppliers.

5) The summation would indicate that by acquiring our major competitor we would at a single jump achieve dominance in a growing field and occupy a powerful position to uplift profit levels. The end could be achieved by other means as described below and the only differences would be slower progress and continued price competition. The end desired can be achieved either way and it is not to be inferred that acquisition is the only reasonable means. IPM is dominated to an unbelievable extent by the capability and energy of a single individual who has admitted to the burden of this load. While this has been a labor of love to this point, no secondary management has arisen that has demonstrated their ability to carry on.

ALTERNATE PROPOSALS

1) Valley Forge has the executive and engineering talent to achieve the same ends. Mainly the difficulty would be the money required and the time needed to inaugurate and implement each of the missing segments. Valley Forge has not penetrated the alternator market and we would need tooling and inventory for Chrysler and Delco Remy alternators. It is our estimate that each of these AC systems would require an initial tooling expense of perhaps $75,000 with an initial backup inventory of $50,000. The inventory would level off as sales came in. The Ford alternator would not have to be tooled owing to the fact that all Ford parts could be secured from Ford in the special status that we now have.

2) Valley Forge has been prepared to enter the starter and generator shaft business which has been completely dominated by IPM. We have a supplier who is prepared to produce these items at price levels that would be very desirable. Based on our estimates we would need an initial inventory of perhaps $250,000 to $300,000 which would level off within six months to a normal of possibly $175,000. The entry into this market would be slow owing to the fact that we could not effect a deep penetration until we had broad coverage with which to attract

customers away from IPM. It has been considered and certainly still in consideration that the Shaw Process may well represent a new and desirable avenue of producing shafts.

3) IPM has attained a deserved reputation for equipment that is needed by the rebuilder. The equipment ranges in price from inexpensive items of perhaps ten dollars to complete winding setups involving thousands of dollars. Valley Forge has the capability to enter this field but our opinion is that this program would have to be placed behind any attempts to expand product coverage.

4) It is the rough estimate of Valley Forge that this expansion could not be achieved within our present space limitations. We believe at this point that we can support a total volume of about 7 million dollars in both plants at which point relocation would be mandatory. Aside from construction costs or rental expenses we calculate the sum of $200,000 to relocate our present facilities.

5) We are confident of success regardless of the avenue chosen. Valley Forge is a basic manufacturer of most of their items in the field of rebuilding and does have the know-how to make all of the items. IPM does sub-contract a great percentage of their production and we feel that this gives us an edge that would become more important as our product coverage would increase.

Appendix C—Percentage of New Parts Requirements Purchased by Rebuilders from the Four Largest Rebuilder Suppliers [1] in 1964 (see page 28, *supra*)

Rebuilder & Location	1964 Net Rebuilt Unit Sales	Units Rebuilt [3]	Percentage of Total 1964 New Parts Purchases Represented By Purchases From Four Largest Suppliers [1]
CMS Mfg. Co. Sacramento, Calif.	92,500	ST., G, A	97%
John-Wilmer Corp. Atlanta, Ga.	500,000	Full-line	80-85%
Missouri Research Lab.[2] St. Louis, Mo.	1,178,000	ST., G, A	65%
World Generator South Holland, Ill.	478,000	ST., G, A	60%
Automotive Armature [2] Mooresville, Ind.	1,118,762	ST., G, A, AR.	60%
CAPCO Deluxe Generator [2] Covington, Ky.	1,126,000	G, ST., AR.	78%
Arlington Armature Arlington, Va.	123,500	ST., A, G	100%

[1] IPM, Ace, Valley Forge, and Vulcan
[2] Among top ten rebuilders in nation
[3] Types of units are designated by the following abbreviations: Generators (G); Alternators (A); Starters (ST.); Armatures (AR.).
Tr. 748-751, 790-797, 832, 835, 839, 841, 892-93, 896-97, 1287, 1289, 1306-07, 2285, 2322-23, 2506, 2509, 2532-33

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

* * (Caption—Dkt. 8775) * *

By Commissioner Dennison, Dissenting:

I find myself unable to agree with the majority's treatment of the relevant product market. Unlike most market definition issues, the problem is not whether the products of the acquiring company compete with those of the acquired; rather, the issue is the size of the product market in order to determine whether there is the substantial lessening of competition by the acquisition of a competitor. To establish a violation of Section 7, complaint counsel must prove that the merger between the two electrical equipment suppliers substantially lessened competition in that line of commerce.

Complaint counsel maintain that the relevant product market is the new automobile electrical component parts sold to production-line rebuilders.

The majority approaches this issue of product market from two perspectives: Companies which make up the demand side, and those who compose the supply side. On the demand side, for example, the majority limits rebuilders to only those employing a production-line method and not engaged in "in-house" production of component parts. On the supply side, the Commission restricts its

consideration of market size to exclude respondent's competitors who utilized used or rebuilt parts (as opposed to new parts), original equipment manufacturers who sell to rebuilders, suppliers of single line items and those who did not sell "primarily" to rebuilders. In each instance the majority determined either the competition was outside the relevant product market or, if within, was negligible. I am not persuaded by the evidence that such is the case.

I cannot agree with the majority's view that complaint counsel has met his burden in demonstrating the size and dimension of the relevant line of commerce. While I may subscribe to the general proposition that the Commission does not have the burden of listing all and every competitor in order to determine the market, there must be a sufficient treatment of the factors in such market to meaningfully show what share the respondent enjoys vis-a-vis its competition. This record does not adequately treat the type or number of respondent's competitors, nor does it show their size.

While embracing the teaching of *Brown Shoe*,[1] the majority carries the guidelines to the extreme. There may well be industry recognition of "production-line" rebuilders on the demand side of the market. Recognition of such a different production system is, according to the majority, tantamount to a separate sub-market. However, recognition alone is a distinction without necessarily a difference.

With respect to the majority's use of the distinct pricing structure in establishing the relevant market, again I am unconvinced. For instance, the majority opinion itself concedes that demand for "new" component parts is substantially diminished when "used" parts are avail-

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[1] *Brown Shoe Co.* v. *United States*, 370 U.S. 294.

able. (Slip Opinion p. 18) What better evidence can there be of cross-elasticity of demand? See *Papercraft Corp.*, Docket No. 8779, Slip Opinion p. 8, n. 22 (June 30, 1971).

The majority's curious market definition closely approximates what Justice Fortas once described as a "strange red-haired, bearded, one-eyed man-with-a-limp classification".[2] I am unable to support this tortured definition of product market and, therefore,

I dissent.

February 16, 1973

[2] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 585.

Supreme Court, U. S.
FILED
AUG 8 1975
MICHAEL RODAK, JR., CLERK

No. 74-1502

In the Supreme Court of the United States

OCTOBER TERM, 1975

AVNET, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
Assistant Attorney General,

CARL D. LAWSON,
Attorney,
Department of Justice,
Washington, D.C. 20530.

ROBERT J. LEWIS,
General Counsel,

GERALD HARWOOD,
Assistant General Counsel,
Federal Trade Commission,
Washington, D.C. 20580.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a)[1] is reported at 511 F.2d 70. The opinion of the Federal Trade Commission (Pet. App. 19a-84a) is reported at 82 F.T.C. 444.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1975. The petition for a writ of certiorari was filed on May 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "App." refers to the joint appendix in the court of appeals.

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by an alleged ambiguity in the Federal Trade Commission's administrative complaint concerning the complaint's theory of the relevant line of commerce.

2. Whether the Commission correctly determined that the sale of new parts, materials, and equipment to production-line rebuilders of automotive electrical units is a relevant line of commerce for purposes of evaluating the competitive effects of the acquisition of one manufacturer of such products by another.

STATUTES INVOLVED

The relevant portions of Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, and of 5 U.S.C. 554 (formerly Section 5 of the Administrative Procedure Act), are set forth at Pet. 2-3.

STATEMENT

1. The Federal Trade Commission issued an administrative complaint in April 1969 charging that petitioner's 1965 acquisition of Guarantee Generator and Armature Co., d/b/a International Products and Manufacturing Co. (hereinafter "IPM"), violated Section 7 of the Clayton Act, 15 U.S.C. 18. After a hearing and an initial decision by an administrative law judge, the Commission concluded that the acquisition violated Section 7, and it ordered petitioner to divest itself of IPM (Pet. App. 19a-84a).

In July 1964, petitioner, a diversified company, acquired Valley Forge Products, Inc., the nation's third largest manufacturer and distributor of new parts and materials used by rebuilders of automotive electrical parts, with annual sales of almost $2 million. In January 1965, petitioner acquired IPM, the nation's largest supplier of such equipment and Valley Forge's principal competitor, with

annual sales of more than $11 million. After the acquisition of IPM, petitioner's sales to production-line rebuilders of automotive electrical parts represented about two-thirds of the total in that market. (Pet. App. 3a-4a.)

Production-line rebuilders of electrical units disassemble inoperative used units (or "cores"), discard unsalvageable parts, and rebuild the units on a production-line basis using salvageable parts from used cores and new parts purchased from rebuilder suppliers such as IPM and Valley Forge. The resulting products are sold through wholesalers for ultimate resale to consumers at prices 30 to 40 percent below the cost of the new units sold by "original equipment manufacturers" (Pet. App. 22a, n. 5).[2] Despite the price differential, the quality of the rebuilt units is comparable to that of the new units produced by OEM's (*ibid.*).

The rebuilders' price advantage depends upon the availability of the relatively low-priced new parts furnished by rebuilder suppliers such as IPM and Valley Forge. The new parts produced by OEM's are too costly for the rebuilders (Pet. App. 24a). Thus, as the Commission found, "a small group of rebuilder suppliers, led by IPM and Valley Forge, has essentially been the sole source of new parts for rebuilders since the inception of the rebuilding industry in the 1930's" (*ibid.*).

Rebuilding is also done on a much smaller scale by custom rebuilders or repair shops. They rebuild single units, usually as a service to individual customers, who are ordinarily billed directly on a parts-and-labor basis. Unlike production-line rebuilders, custom rebuilders buy their

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[2] Original equipment manufacturers, referred to in the opinions in this case as "OEM's," include the major automobile companies and other firms that produce equipment for installation on new vehicles (Pet. App. 2a).

parts primarily from OEM wholesale distributors rather than from rebuilder suppliers, despite the higher prices. (Pet. App. 26a-27a.)

The Commission found that the relevant line of commerce is direct sales of new parts, materials, and equipment by rebuilder suppliers to production-line rebuilders (Pet. App. 26a-45a), and that the effect within that market of petitioner's acquisition of IPM was substantially to lessen competition. The acquisition gave petitioner "an impregnable position atop the concentrated rebuilder supply industry with approximately 60 percent of the market, six-times greater than that of its largest competitor" (Pet. App. 66a). Moreover, "there is ample evidence to indicate that Avnet acquired IPM to diminish price competition, divide markets, and increase the already formidable barriers to entry in the industry" (*ibid.*).

2. The court of appeals affirmed (Pet. App. 1a-18a). It upheld the Commission's market definition against petitioner's claim that sales to custom rebuilders as well as sales to production-line rebuilders should have been included (*id.* at 14a-17a), and it rejected petitioner's contention that it was deprived of administrative due process because the administrative complaint did not explicitly state that the relevant line of commerce was limited to sales to production-line rebuilders (*id.* at 10a-12a). The court stated: "[O]ur review of the record convinces us that Avnet's counsel had sufficient understanding of the issues, and sufficient time to prepare Avnet's defense, to require rejection of the argument that they were denied administrative due process when the Hearing Examiner accepted complaint counsel's definition of the term 'rebuilder'" (*id.* at 12a).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. Petitioner contends (Pet. 13-19) that it was deprived of a fair administrative hearing because complaint counsel, in seeking to limit the relevant line of commerce to sales by rebuilder suppliers to *production-line* rebuilders, departed from the allegations in the complaint that referred only to "rebuilders."

Petitioner's suggestion that complaint counsel altered the theory of the case in midstream is unfounded. The complaint and the hearing record show that complaint counsel proceeded throughout on the theory that firms specializing in the manufacture of new parts for direct sale to companies that rebuild automotive electrical parts on a production-line basis compete in a distinct market that is relevant for evaluating the effects of the IPM-Valley Forge combination.

While the complaint used the term "rebuilders" rather than "production-line rebuilders," that does not mean that complaint counsel intended to include custom rebuilders in the relevant line of commerce. It means only that custom rebuilders or repair shops were not thought to be "rebuilders." Indeed, as the court of appeals stated, much of the disagreement between the parties at the time of the administrative hearing was over the proper definition of the term "rebuilder" (Pet. App. 11a). Complaint counsel adhered consistently to the position that the term referred only to production-line rebuilders; that position is consistent with industry usage of the term "rebuilder" (App. 513, 555, 932, 1132).

The real issue here, therefore, is not whether complaint counsel may shift theories in midstream, but whether the alleged ambiguity in the complaint's wording so prejudiced petitioner's defense as to deprive it of due process. In our view, the complaint gave petitioner adequate notice of the proposed line of commerce.

Petitioner defends its misreading of the complaint by pointing to an allegation that IPM made sales "to over 5,000 independent distributors and rebuilders" (App. 44). But that paragraph of the complaint merely described IPM's business and did not purport to define the line of commerce affected by the acquisition. The relevant market was described in paragraph 15 (App. 45). The references there to the number of sellers and the volume of sales gave petitioner sufficient notice that the Commission considered sales to production-line rebuilders to be the line of commerce.

Even assuming, as the court of appeals did, that petitioner's "reading of the complaint was * * * reasonable" (Pet. App. 11a), the court correctly found that petitioner's defense was not prejudiced by the ambiguity (*id.* at 11a-12a). Cf. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-351. That finding, which rests on a careful assessment of the hearing record, does not warrant review by this Court.

2. Petitioner contends (Pet. 20-25) that the relevant line of commerce must include sales to custom rebuilders as well as production-line rebuilders. The Commission found, however, that, "while production-line rebuilders could not operate without a supply of new parts from rebuilder suppliers, custom rebuilders buy their new parts primarily from OEM wholesale distributors at prices 20-40 percent higher than those charged by the rebuilder suppliers" (Pet. App. 27a; footnote omitted).

The Commission reasonably concluded that "the tremendous disparity between the production-line rebuilders' dependence on rebuilder suppliers and the custom rebuilders' reliance on wholesalers, despite the fact that wholesalers charge a substantially higher price, indicates that sales to these two categories of rebuilders are in

different lines of commerce" (*id.* at 28a).[3] Because of the peculiar dependence of production-line rebuilders upon rebuilder suppliers, the competitive effects of a combination of two suppliers will likely be felt most directly by production-line rebuilders. Sales to production-line rebuilders constitute a relevant line of commerce even if sales to all rebuilders might also be a relevant line of commerce for some purposes.

International Tel. and Tel. Corp. v. *General Tel. and Electronics Corp.*, C.A. 9, No. 73-1513, decided April 25, 1975, does not conflict with the present case. Unlike the situation here, neither of the two classes of customers there was found to be peculiarly dependent upon a particular group of suppliers.

Petitioner acknowledges that there are "situations in which sales of similar products to different classes of customers have been placed in separate markets" because of "significant factors which provide strong support for drawing a distinction" (Pet. 23). That is precisely the situation here.

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[3]The Comission also found that "the industry itself clearly recognizes the basic practical difference between production-line and custom rebuilders as demonstrated not only by the testimony of several major rebuilders * * * but also by the existence of a separate trade association limited to production-line rebuilders and their suppliers" (Pet. App. 26a-27a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
Attorney.

ROBERT J. LEWIS,
General Counsel,

GERALD HARWOOD,
Assistant General Counsel,
Federal Trade Commission.

AUGUST 1975.

Supreme Court, U. S.
FILED
SEP 30 1975
MICHAEL RODAK, JR., CLERK

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY MEMORANDUM

ARNOLD M. LERMAN
RONALD J. GREENE
NEAL M. GOLDBERG
Attorneys for Petitioner, Avnet, Inc.

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006
(202) 872-6000

September 30, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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PETITIONER'S REPLY MEMORANDUM

I.

Avnet demonstrated in its Petition that this case represents a clear example of a recurring procedural problem in administrative practice—the failure of agencies to give clear notice to respondents when they depart from the allegations of a complaint. In this case, the Court of Appeals specifically found that "Avnet's reading of the complaint was . . . reasonable" and that the case was decided on an entirely different basis from that originally alleged. 511 F.2d at 76. Because of lack of

notice, Avnet was forced to try the case without any clear indication of the factual and legal theories it was required to meet. The Petition suggests a simple remedy: whenever an agency departs from the allegations of a complaint, it should explicitly acknowledge this fact on the record.

The Government's response to this argument in fact provides the most cogent reason why certiorari should be granted and the proposed remedy adopted. Now we are told that Commission counsel never changed theories. Instead, they are supposed to have known all along that the market which the Complaint alleged to include all "rebuilders" was to be restricted so that it included only production-line rebuilders. A simple question immediately arises: if Commission Counsel knew all along that they were pursuing a theory which departed from what the Court of Appeals found to be the "reasonable" reading of the Complaint, did they not have an affirmative obligation to inform the Respondent of the change? The Government's answer is that no such obligation exists—ambiguous complaints, which mean different things to the different parties, are an acceptable part of administrative practice. We submit that this Court should not permit such an approach to fair administrative procedure to continue unchecked. Agencies should not be permitted knowingly to mislead parties about the issues which they are being required to meet.

The facts of this case provide a perfect example of the dangers inherent in the Government's approach. During the Commission's presentation of its own case, it elicited testimony from rebuilder suppliers concerning their sales in the relevant market by asking generally worded questions concerning their sales to "rebuilders." [1] We are now told that when Commission counsel asked

[1] App. 594, 601, 616-17, 627-29, 664, 685; CX 26, 271, 272, 273, 274, 278.

these questions it was seeking evidence only about sales to "production-line rebuilders." But the witnesses clearly gave answers consistent with a broader reading of the questions (and of the similar language in the Complaint),[2] and Avnet on cross examination did not attack these answers because it too "misread" the "ambiguity" which the Government now says it knowingly allowed to be inserted in the case. Cross-examination would have shown that the Government's alleged market share data did not correspond with its own definition of the market.

If Commission counsel knew that Avnet was proceeding on an understanding which was reasonably based upon language in the Complaint, but which differed from the approach they were following, they had an obligation to so state. Instead, it is now clear—at least if we accept the Government's current arguments—that Commission counsel were content to engage in gamesmanship and to take advantage of an "ambiguity" which allowed them a tactical advantage. As we argued in the Petition, this Court should grant certiorari to consider whether such practices can be allowed to continue.

II.

We also demonstrated in the Petition that the decision of the Court below was in direct conflict on the market definition issues with the decision of the Ninth Circuit in *International Tel. & Tel. Co.* v. *General Tel. and Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975). The

[2] *See, e.g.*, App. 460 (Precision Field Coil offered coils packaged separately and thus not sold to "rebuilders" by the Commission's definition); App. 592 (Butts Electric sold to a few repair shops such as garages); App. 743, 933-34 (Ennis' customers included repair shops and small rebuilders); App. 760-61 (IPM sold to various kinds of companies termed "repair shops" by the Commission); App. 1007 (Valley Forge packaged some products individually and sold to custom rebuilders); CX 273 c-i (Preferred Electric offered parts sold and packaged individually and, thus, not sold to the Commission's "rebuilders" which allegedly buy in bulk).

Seventh Circuit held that "the clear functional difference between the two groups of rebuilders [custom and production-line] provides an adequate prima facie basis for placing them in different submarkets," 511 F.2d at 78, even though both groups purchased identical products and used them for identical purposes. The Ninth Circuit, in contrast, held that a "functional difference" could not justify an exclusion of a group of purchasers from a market; it refused to exclude from the relevant market sales of identical items of telephone equipment to customers other than telephone operating companies since sales to the operating companies were included in the market. The Government's brief argues that there is no conflict because the group of purchasers included in the market by the Seventh Circuit were peculiarly "dependent" on a particular group of rebuilder suppliers.

The Government's purported distinction does not, however, eliminate the conflict. The Commission argued the "dependence" theory to the Court of Appeals, but the Court did not adopt it. Instead, it rested its decision on the supposed "functional difference" among rebuilders, and this rationale is directly in conflict with the decision of the Ninth Circuit.

Moreover, even if the Government's "dependence" rationale had been adopted by the Seventh Circuit, there would still be a conflict, because another portion of the Ninth Circuit's *ITT* decision rejected that rationale as well. The Ninth Circuit—in addition to rejecting "functional differences" among equipment purchasers as a ground for distinguishing submarkets—was also faced with an argument that a certain segment of the purchasers' market (the Bell operating companies) was heavily dependent—indeed legally dependent under the terms of a consent decree—upon a particular supplier of telephone equipment (Western Electric). The district court had accepted that finding and excluded the Bell

operating companies from the relevant customer market. The Court of Appeals reversed, concluding that even "vertical foreclosure in itself does not justify defining a customer market to exclude 'captive sales'" and that there was "no basis for concluding that Bell's purported foreclosure of a large fraction of the telephone equipment market is an immutable fact of market life." 518 F.2d at 931. Thus the Ninth Circuit has held that dependence, even to the point of "captive sales," is insufficient, by itself, to distinguish one group of customers buying an identical product from another group, and to exclude one group from a relevant market. Yet that discredited theory—which was put forth by the FTC in this proceeding but implicitly rejected by the Seventh Circuit—is advanced at this stage as the ground upon which the conflict can be avoided.[3]

Thus, whether the Court below excluded sales to custom rebuilders from the product market because of the purported peculiar dependence of other rebuilders on particular suppliers, or whether it acted (as its opinion specifically states) on the basis of alleged functional differences among rebuilders, the decision below squarely conflicts with the holdings in the Ninth Circuit in *ITT*, and resolution of the conflict by this Court is required.

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[3] In fact, Avnet argued in its brief to the Court of Appeals that the record would not support a finding of "dependency." Reply Brief at 11-17.

CONCLUSION

For the reasons stated above and in our Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

ARNOLD M. LERMAN
RONALD J. GREENE
NEAL M. GOLDBERG
Attorneys for Petitioner, Avnet, Inc.

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006
(202) 872-6000

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